

F. A. HAYEK AND THE MIRAGE
OF SOCIAL JUSTICE

MICHAEL J. MACHAN

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Michael J. Machan

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F. A. Hayek and the Mirage of Social Justice

(Abstract)

This dissertation is an examination of the social philosophy of F. A. Hayek, with especial reference to his critique of social justice. Hayek's critique is built upon his overall social philosophy. The first part of the dissertation, therefore, is an explication of certain essential elements of that philosophy: to wit, the spontaneous order, rules of just conduct, law, justice, and lastly the critique of social justice itself. The second part of the dissertation is a critical analysis of Hayek's argument. I first consider whether the idea of the spontaneous order and Hayek's conception of justice are viable independently of any conflicts with social justice, concluding that there are some problems with these elements. Next, I examine the critique of social justice: considering first whether social justice is inevitably incompatible with Hayek's social order, and then considering whether the rejection of social justice is compatible with the normative premise which underlies Hayek's philosophy. I conclude that Hayek has problems on both of these fronts. I finish by presenting a general appraisal of the merits and value of Hayek's critique of social justice.

CHAPTER ONE

INTRODUCTION

This dissertation is an exegesis and critique of F. A. Hayek's thoughts on social justice. However, while the particular concern is Hayek on social justice, there is also a more general concern with his overall social philosophy. The reason for this will be mentioned shortly.

The dissertation focuses almost exclusively on Hayek's thought as it is explicated in his magnum opus, the three volume Law, Legislation and Liberty. The three volumes of this work, published in 1973, 1976, and 1979,¹ represent the most comprehensive and definitive statement of Hayek's thoughts on social order. While I have considered his earlier writings on social philosophy, dating back to The Road to Serfdom (1944),² I have utilized those earlier writings only to the extent that they proved useful in clarifying gaps or ambiguities found in Law, Legislation and Liberty. I have, however, paid no concern to any contradictions or discrepancies which might exist between those earlier writings and the magnum opus. My concern throughout has been an analysis of Hayek's 'final' statement on social philosophy and social justice, rather than an intellectual history of his thoughts thereon.

Even as to the magnum opus my concern has been selective. I have concentrated almost exclusively on the first two volumes: Rules and Order and The Mirage of Social Justice. It is primarily here that Hayek's thoughts on social justice are to be found. The third volume, The Political Order of a Free People, is essentially a utopian reconstruction of the democratic representative form of government. Whereas Hayek's serious analysis is to be found in the first two volumes, his speculative dreaming is found in the third. Thus, the third volume added very little to the arguments with which I was concerned, aside from a change in terminology. For that reason I have largely ignored it herein.

As far as the specific topic of this dissertation, Hayek's thoughts on social justice, those can be epitomized quite succinctly. Hayek's attitude towards the concept of social justice can fairly be described as disparaging at the very best. He decries it as a meaningless panacea, meaning all things to all men -- hence "the mirage of social justice". More importantly, he maintains that the pursuit of social justice is incompatible with and inimicable to the social order which he both describes and prescribes. This social order is, in turn, necessary for both the protection and fostering of individual liberty. And it is for that reason that Hayek vigorously castigates contemporary society for its obsession with and pursuit of social justice.

I was initially drawn to embark on this study of Hayek because I felt a definite sympathy with his critique of social justice. Respect for individual liberty is perhaps the paramount value in my pantheon of values. And I was and am deeply disturbed by the threat to liberty posed by the ever expanding reach of central government necessitated by the growth of the welfare state. Hayek's critique of social justice appealed to me as a cogent and persuasive argument against this trend. I set out, therefore, to make a

detailed, albeit sympathetic, analysis of Hayek's critique. However, as I came to close grips with Hayek's argument I soon learned that it was far less convincing than it had appeared to me at first. Hence I found myself approaching Hayek more as a skeptic who wanted to believe than as an outright partisan.

Equally importantly I discovered as I began to work with Hayek that the scope of my task was very quickly and very significantly expanding. I discovered that Hayek's social philosophy was a seamless web to end all seamless webs. The various elements of his social order proved to be so inextricably interconnected that it was impossible to consider one without at the same time considering each of the others. Thus, where I started out to consider Hayek's position on social justice, I soon found that I could not do this without at the same time considering his social philosophy in general.

It is for that reason that the first part of this dissertation (Chapters Two through Six) is a comprehensive analysis of the basic components of Hayek's social system. Those components are critical rationalism and spontaneous order, rules of just conduct, law, justice, and finally the express critique of social justice itself. A separate chapter is devoted to each of these topics. The purpose of these chapters is primarily exegetical. Although occasionally some element of criticism is required to complete the exegesis, my intent throughout the first part is to explicate what Hayek says rather than to criticize the same.

I must stress, however, that this explication involves considerably more than a mere paraphrasing of Hayek's thoughts. It also involves a substantial amount of rational reconstruction. While Hayek's arguments read well, they are quite often far from coherent when one tries to come to grips with the ipsissima verba. This is essentially for two reasons. The first is that the very fluency of Hayek's style obscures the fact that certain seemingly key concepts are often used with a variety of meanings which Hayek himself does not expressly tie together. As we shall see in Chapter Four

this is especially the case with justice, but it is also true with other concepts as well. The second reason is that there is a certain amount of circularity in Hayek's arguments: e.g. concept X cannot be understood without concept Y, which cannot be understood without concept Z, which in turn cannot be understood without concept X. As a result of both of these factors the pieces necessary for Hayek's social system are generally present, but they are frequently not set forth in any coherent order. Hence, in order to understand the various components of Hayek's social philosophy it is not enough simply to look at what he says. It is also necessary to meld his thoughts into a coherent and cohesive whole. And this I have tried to do in the exegetical part of this dissertation.

In the second part of the dissertation (Chapters Seven through Eleven) I turn expressly to criticism. And it is here that I return more precisely to my specific aim in writing this dissertation. The analysis here is focused solely on Hayek's critique of social justice. This is not to say that there is no further consideration of the other components of his social system, for there is. However, any such consideration occurs only to the extent that it is relevant to the critique of social justice. Hence, issues relating to those other components, which might seem to warrant consideration in and of themselves, will not be dealt with herein. The essential concern of this dissertation remains at all times Hayek's critique of social justice.

As far as the nature of my analysis, that is determined by the form of Hayek's critique. Although Hayek inveighs against the concept of social justice, he does not specifically confront the sorts of theories offered in support thereof by men such as John Rawls.³ Instead he propounds what might be called a counter-theory of social justice. He puts forward a social philosophy containing an involved and detailed theory of justice, and he maintains that consideration of

those concerns which others term a matter of social justice is precluded ab initio by his social philosophy. Thus, Hayek's critique of social justice does not tread the ground normally covered by theorists of social justice, but is rather very much sui generis.

For this reason, it seems to me that the most effective way to come at Hayek's critique is from within his system. That is to say, I do not consider the sort of arguments raised by theorists who advocate the pursuit of social justice. Nor do I attack the most basic foundations of Hayek's system. Instead, my approach is to focus on the aspect of internal consistency and coherence. What I attempt to do is determine whether the counter-theory which Hayek has propounded is able to stand on its own feet, or whether internal difficulties suggest that the theory may be unviable. Should that counter-theory prove unviable, then Hayek will have failed in his attempt to preclude ab initio any consideration of social justice. If, on the other hand, the counter-theory proves viable, then Hayek will have presented a major challenge to those who advocate the pursuit of social justice.

CHAPTER TWO

CRITICAL RATIONALISM AND THE SPONTANEOUS ORDER

It would be no exaggeration to say that social theory begins with -- and has an object only because of -- the discovery that there exist orderly structures which are the product of the action of many men but are not the results of human design.¹

As was noted in the Introduction to this dissertation, Hayek's critique of social justice is made within the context of his overall social philosophy. Viewed in the broadest light possible the task which Hayek has set himself in Law, Legislation and Liberty is to elucidate the basic principles of what he calls "the liberal social order". And the critique of social justice is, in a sense, one aspect, albeit a negative one, of this social order. Thus, until we have at least some familiarity with the various components of Hayek's social order we cannot hope to understand his critique of social justice.

In this chapter and the next three I will undertake an examination of the most essential components of Hayek's social system. This examination will, of course, be less than comprehensive, inasmuch

as each of the components to be considered could by itself justify a full-length study. Given that limitation, the best that I can strive for in this study is a very thorough sketch of the relevant components. I will attempt to set forth in a rational and comprehensible order all of the basic points touched upon by Hayek. But for the most part I will not concern myself with answering any questions which might be raised by those points, except as those questions relate to the critique of social justice.

In this chapter my focus will be upon what might be called the basic structure or skeleton of Hayek's social order. In the next three chapters I will consider the components which constitute the substance of that order.

A. Critical Rationalism

Before turning specifically to the structure of Hayek's social order we must first consider an aspect of his epistemology which is quite significant. This is the distinction between critical and constructive rationalism. The significance of this distinction lies in the fact that it is Hayek's espousal of critical rationalism which very much informs his views on the social order.²

What Hayek dubs "constructive rationalism" is in effect the rationalism of the Enlightenment, the rationalism which has its genesis in the thought of Rene Descartes.³ It is a belief in the primacy of the human intellect. To the constructivists there are virtually no limits to what the human mind can achieve, if only it concentrates its energies. The key to this form of rationalism lies in the use of deductive reasoning. Truth can only be reached by deductively

reasoning from incontestable first principles.

Since for Descartes reason was defined as logical deduction from explicit premises, rational action also came to mean only such action as was determined entirely by known and demonstrable truth.⁴

And this was a notion of reason which was notably different from that which had preceded it.

'Reason', which had included the capacity of the mind to distinguish between good and evil, that is between what was and what was not in accordance with established rules, [Footnote omitted] came to mean a capacity to construct such rules by deduction from explicit premises.⁵

Concomittant with this view of reason is the idea which has been designated as Cartesian dualism. The essence of this idea, also dubbed "the ghost in the machine", is that the mind in some way exists independently of the world which the body inhabits, and that the mind is able in some way to structure the world to accord with its reasoning.

The errors of constructivist rationalism are closely connected with Cartesian dualism, that is with the conception of an independently existing mind substance which stands outside the cosmos of nature and which enabled man, endowed with such a mind from the beginning, to design the institutions of society and culture among which he lives.⁶

As the foregoing passage indicates, the effects of critical rationalism are especially in the realm of social theory. To the constructivists there are only two possible ways in which to view society and its institutions. They are either natural or they are artificial. Such institutions can be deemed natural only if they exist altogether independently of any human action and design.⁷ This, of course, is the notion of natural which is thought to be the essence of traditional Natural Law theory. By contrast, social institutions are deemed artificial if they are the outcome of human action and/or design.⁸ Given this dichotomy,

which is considered to exhaust the field of reference, the constructivists deem it beyond dispute that social institutions must be artificial.

[Constructivism] produced a renewed propensity to ascribe the origin of all institutions of culture to invention or design. Morals, religion and law, language and writing, money and the market, were thought of as having been deliberately constructed by somebody, or at least as owing whatever perfection they possessed to such design.⁹

From this two conclusions follow. The first is that social institutions are justified only to the extent that they can be shown to be effective means towards the production of desired ends.

[A]ll institutions which benefit humanity have in the past and ought in the future to be invented in clear awareness of the desirable effects that they produce; ... they are to be approved and respected only to the extent that we can show that the particular effects they will produce in any given situation are preferable to the effects another arrangement would produce¹⁰

The second is that we should now deliberately design, or redesign if necessary, our social institutions to insure that they are the most effective means possible for the pursuit of the desired ends. Thus, according to Hayek, the constructivists argue "that we should so re-design society and its institutions that all our actions will be wholly guided by known purposes."¹¹

Or, as Voltaire put it: "if you want good laws, burn those you have and make new ones. [Footnote omitted]"¹²

Of course, it goes almost without saying that, given this emphasis on the deliberate designing of social institutions, the constructivists look disparagingly upon tradition. Since deductive reasoning is the touchstone of truth, and since as to social institutions the sine qua non is conduciveness to a determinate end,

the mere fact of the long-standing existence of a particular institution carries very little weight. Either an institution is conducive to a determinate end or it is not; that it has existed for a long time is essentially irrelevant to assessing its merit.

It is to this philosophical conception that we owe the preference which prevails to the present day for everything that is done 'consciously' or 'deliberately' Because of this the earlier presumption in favour of traditional or established institutions and usages became a presumption against them, and 'opinion' came to be thought of as 'mere' opinion -- something not demonstrable or decidable by reason and therefore not to be accepted as a valid ground for decision. 13

The final point to note about the proponents of constructive rationalism is that they have a very decided aversion to the use of abstraction. Their concern is always with particulars: Particular means to particular ends. Hence, they look down upon attempts to deal with problems on a general level by the use of abstract rules.

It is the over-estimation of the powers of reason which leads to the revolt against the submission to abstract rules. Constructivist rationalism rejects the demand for this discipline or reason because it deceives itself that reason can directly master all the particulars; and it is thereby led to a preference for the concrete over the abstract, the particular over the general, because its adherents do not realize how much they thereby limit the span of true control by reason. 14

Hayek, as should be quite apparent from the various passages I have cited, is very much at odds with this view of rationalism. Instead, he allies himself with those such as David Hume who are often designated as anti-rationalists. However, Hayek balks at ceding the term 'rationalist' to the constructivists. He himself does not reject the use of reason, as the term

anti-rationalist might suggest. Rather, he believes that reason is of value, but that it is subject to very determinate limits. For that reason he designates his own position as "critical rationalism".¹⁵

Hayek sees critical rationalism as beginning with Bernard Mandeville and really taking root in the Scottish Enlightenment.¹⁶ It is with this latter group of thinkers that Hayek is in especial accord on most of his social philosophy: Adam Smith, Adam Ferguson, and most especially David Hume can quite legitimately be considered Hayek's intellectual forbears.

Whereas constructive rationalism stresses the power of the human mind, critical rationalism places its greatest emphasis on the inevitability of human ignorance. While constructivists tend to gloss over the fact that we are not and can never be in possession of all the facts which are a part of their deductive chain, critical rationalists consider ignorance the point from which all reasoning must begin.

There exists therefore a great temptation, as a first approximation, to begin with the assumption that we know everything needed for full explanation or control. This provisional assumption is often treated as something of little consequence which can later be dropped without much effect on the conclusions. Yet this necessary ignorance of most of the particulars which enter the order of a Great Society is the source of the central problem of all social order and the false assumption by which it is provisionally put aside is mostly never explicitly abandoned but merely conveniently forgotten. The argument then proceeds as if that ignorance did not matter.¹⁷

The tendency to gloss over the ever-presence of ignorance may arise from a failure to adequately consider the types of knowledge with which we must deal. There is, of course, general knowledge which can be expressed in rules and theorems, and trends, and

the like. In this realm there is, admittedly, constant advancement; although even here we can never hope to 'master' the field. But even more importantly there is the knowledge that deals with particulars.

In the first instance, the incurable ignorance of everyone of whom I am speaking is the ignorance of particular facts which are or will become known to somebody and thereby affect the whole structure of society. This structure of human activities constantly adapts itself, and functions through adapting itself, to millions of facts which in their entirety are not known to anybody.¹⁸

Given the vast multiplicity of such particular facts, it is laughably naive to presume that there could ever be a single source which would be in possession of all of these facts. Such a possibility is no possibility at all.

The characteristic error of the constructivist rationalists in this respect is that they tend to base their argument on what has been called the synoptic delusion, that is, on the fiction that all the relevant facts are known to some one mind They seem completely unaware that this dream simply assumes away the central problem which any effort towards the understanding or shaping of the order of society raises: our incapacity to assemble as a surveyable whole all the data which enter into the social order.¹⁹

Now some might argue that the steady growth of scientific knowledge must minimize the sway of ignorance. But science is no real help. It too deals with knowledge at a general level. And any advances made therein will in no way diminish the multiplicity of facts with which individuals come to grips in their daily lives.

The limitation of knowledge with which we are concerned is therefore not a limitation which science

can overcome. Contrary to a widely held belief, science consists not of the knowledge of particular facts; and in the case of very complex phenomena the powers of science are also limited by the practical impossibility of ascertaining all the particular facts which we would have to know if its theories were to give us the power of predicting specific events.²⁰

And, Hayek goes on to add:

[N]either science nor any known technique [Footnote omitted] enables us to overcome the fact that no mind, and therefore also no deliberately directed action, can take account of all the particular facts which are known to some men but not as a whole to any particular person.²¹

In short, for the critical rationalists ignorance is a factor which, try as we might, we cannot hope to avoid. And so, rather than ignoring it, we must instead learn to take it into account in our reasoning processes.

Given the stress on the inevitability of ignorance it should come as no surprise that the way in which critical rationalism approaches social theory is quite different from the way in which constructive rationalism approaches it. At the very outset the critical rationalists reject the idea that the mind in some way stands outwith society and culture. Instead they see the human mind as inter-acting with social institutions, as something which both affects and is affected by these institutions.

The fact is, of course, that this mind is an adaptation to the natural and social surroundings in which man lives and that it has developed in constant interaction with the institutions which determine the structure of society. Mind is as much the product of the social environment in which it has grown up and which it has not made as something that has in turn acted upon and altered these institutions.²²

Critical rationalism also differs from constructive rationalism in its view of what might be called the 'function' of society. The constructivists, as we have seen, believe that society must be judged in terms of its efficiency in achieving pre-determined ends. The critical rationalists, on the other hand, do not think society should be viewed as an instrumentality to some determinate end. Instead they think of it as a never-ending process by which men are able to utilize the vast stores of knowledge possessed by their fellows but of which they themselves are ignorant.

[C]ivilization rests on the fact that we all benefit from knowledge which we do not possess. And one of the ways in which civilization helps us to overcome that limitation on the extent of individual knowledge is by conquering ignorance, not by the acquisition of more knowledge, but by the utilization of knowledge which is and remains widely dispersed among individuals.²³

While it is difficult to single out any one aspect of the position of the critical rationalists as the most significant, were one to do so it would have to be their response to the constructivists' natural-artificial dichotomy. The constructivists saw this distinction as turning on whether the social institution existed independently of human action and design. And under this distinction social institutions were patently artificial. But the critical rationalists turned this dichotomy into a tri-partite division. To them the alternatives were existence 1) wholly independent of human action, 2) dependent upon human action and human design, and 3) dependent upon human action but not upon design.²⁴ They saw social institutions as falling primarily into this third category, being neither natural nor artificial, but rather evolutionary. And it is this notion of evolutionary development which explains how complex social institutions could ever have arisen, given the limitations which unavoidable ignorance sets

to our reasoning processes. And of course, it also justifies the value of tradition, for the traditional institutions are in fact those which have evolved over the ages.

The final way in which the critical rationalists differ from the constructivists is in the importance they attach to abstraction. We have already seen that the constructivists reject the use of abstraction and favor instead dealing with particulars. By contrast the critical rationalists willingly utilize abstractions, recognizing them as a means for working around our unavoidable ignorance as to particulars.

Abstractness will here be regarded, therefore, ... [as] an adaptation to [man's] ignorance of most of the particular facts of his surroundings. ... We never act, and could never act, in full consideration of all the facts of a particular situation, but always by singling out as relevant only some aspects of it²⁵

Thus, rather than being a hindrance to the reasoning process, abstractions are in fact an essential element thereof. They are "the indispensable means of the mind which enable it to deal with a reality it cannot fully comprehend."²⁶ The value of the abstract is something to which we will recur in the next chapter.

To sum up, Hayek considers himself to be a critical rationalist. As such he maintains that, while reason should not be undervalued, neither must it be overvalued.

True rational insight into the role of conscious reason seems indeed to indicate that one of the most important uses is the recognition of the proper limits of rational control.²⁷

And the proper limits of reason are what I have attempted to sketch in this section.

B. The Spontaneous Order

The nature of Hayek's social order is directly dependent upon his critical rationalism. Given the limits of rational thought, Hayek maintains that it is naive to assume that society is a deliberate development. The complexities of even the simplest society are far too involved to be the result of any deliberate planning. The powers of reason are simply not that great. No, the only way in which to explain the existence of societies is, as we have already noted, by use of the notion of evolutionary development. Society is, in the words of Adam Ferguson, "the result of human action but not of human design".²⁸ It is, in short, a spontaneous order.

(It should be noted in passing that "spontaneous order" is for Hayek a very general concept which can be applicable to a variety of situations in both the social and natural world. However, Hayek's primary concern, and my sole concern, is with that type of overall social order which can be designated as a spontaneous order. Accordingly, all discussion of spontaneous orders in this dissertation should be understood to pertain to that context.)

The evolution of social institutions and society in general is for Hayek the result of an unwitting process of trial and error, with survival as the touchstone of success.²⁹ The process was unwitting in that the initiator of a course of action seldom intended, or even foresaw, the ultimate outcome of his actions. Rather, his aim was probably narrower than, if not altogether different from, the ultimate result. However, to the extent his innovation was conducive to the survival of the group of which he was a member -- or at the very least not adverse to such survival -- the innovation itself survived and became

an established practice or institution. As an established practice or institution it became a part of the context within which subsequent innovation would occur. And each subsequent innovation which survived became in turn a part of the established order. Thus, the process continued -- and still continues -- producing results far removed from anything intended by the individual innovators, and, of course, in the process producing a social order.

The spontaneous order resulting from this evolutionary process is designated by Hayek as a cosmos.³⁰ This cosmos results from the unintended and unforeseen results of unknown people reacting to unknown or unforeseen circumstances. No one intends to establish a cosmos. Rather, each individual is intent upon pursuing his own interests. However, in the process of many, many such individuals each pursuing his own interests, a spontaneous order does in fact arise. And it is thus that Hayek can speak of society being the result of human action but not of human design.

This spontaneous order functions through a system of abstract rules, or if you prefer, patterns of behavior. These rules determine what sort of behavior is appropriate in what sort of situations. Such rules not only allow individuals an optimal opportunity to pursue their own interests, but they also allow different individuals an opportunity to pursue their different interests, while at the same time providing a means to utilize knowledge possessed by others. The function of these rules is so important that it is worth quoting Hayek at length.

[I]n a social order the particular circumstances to which each individual will react will be those known to him. But the individual responses to particular circumstances will result in an overall order only if the individuals obey such rules as will produce an order. Even a very limited similarity in their behaviour may be sufficient if the

rules which they all obey are such as to produce an order. Such an order will always constitute an adaptation to the multitude of circumstances which are known to all the members of that society taken together but which are not known as a whole to any one person.³¹

Thus, the spontaneous order can not only be said to function through the use of abstract rules, it can also be said in effect to be constituted by such rules. And these rules are the rules of just conduct, to which the next chapter is devoted.

Before we go any further it is important to note here an ambiguity in the term "spontaneous order". The primary meaning of this term is that the cosmos has originated spontaneously, through the process of experimentation which we have already discussed. In this sense it is, from a backward looking point of view that the order is considered spontaneous. However, the order is also spontaneous in that it functions spontaneously; that is, it allows opportunity for continued experimentation and hence evolutionary or spontaneous development. In this sense it is from a forward looking point of view that the order is considered spontaneous. The importance of this two-fold meaning of spontaneous is that it is possible for an order which functions spontaneously to be deliberately refined and developed.

At the moment our concern must be to make clear that while the rules on which a spontaneous order rests, may also be of spontaneous origin, this need not always be the case. Although undoubtedly an order originally formed itself spontaneously because the individuals followed rules which had not been deliberately made but had arisen spontaneously, people gradually learned to improve those rules; and it is at least conceivable that the

formation of a spontaneous order
relies entirely on ³²rules that were
deliberately made.

The significance of this possibility will become apparent in the next chapter when we discuss the development of the rules of just conduct.

Now, the cosmos or spontaneous order stands in very sharp contrast to another type of order. This other type of order is what Hayek designates as a taxis. A taxis is an order which is very deliberately constructed. It occurs not through any spontaneous development, but rather because someone intends to bring it about.³³ A corporation would be a very good example of a taxis. Aside from its origin there are two other very basic ways in which a taxis differs from a cosmos.

The first is that it is maintained by means of what Hayek calls rules of organization. These are rules which aim at the performance of specific tasks by specific individuals.³⁴ And these rules are quite different from the rules of just conduct through which a spontaneous order functions. Inasmuch as the next chapter deals specifically with rules of just conduct, and also considers the contrast with rules of organization, I will say no more about this topic here.

The other way in which a taxis differs from a cosmos pertains to the question of purpose. In that a taxis is deliberately constructed, it is constructed with a particular purpose in mind.³⁵ It is to achieve this particular purpose, whatever it may be, that a taxis is established in the first place. By contrast, the cosmos has no particular purpose. How could it, since it is not a deliberate construction? Rather than having a particular purpose, the cosmos is a device whereby it has proved possible for individuals to pursue diverse purposes in mutual harmony.

And not having been made it cannot
legitimately be said to have a
particular purpose, although our

awareness of its existence may be extremely important for our successful pursuit of a great variety of different purposes.³⁶

And this is an achievement of no small significance, for in addition to the unavoidable fact of ignorance, we must also face up to the fact that individuals have different purposes in life. Thus, were social organization to be dependent upon congruity of purpose, then the size of social groups would be very severely limited indeed. It is by permitting a social group to coalesce independently of any shared purpose that the cosmos allows societies to form which are far beyond the scope of the family or tribal group.

One tremendous advantage which a spontaneous order has over a taxis, or deliberately constructed order, is that it is able to achieve a vastly greater degree of complexity than could be achieved by any deliberate development. By utilizing abstract rules, and by allowing individuals the opportunity to pursue their own ends, the spontaneous order is able to deal in an orderly fashion with a much greater degree of knowledge than can any taxis.

This means that, though the use of spontaneous ordering forces enables us to induce the formation of an order of such a degree of complexity (namely comprising elements of such numbers, diversity and variety of conditions) as we could never master intellectually, or deliberately arrange, we will have less power over the details of such an order than we would of one which we produce by arrangement.³⁷

Hayek's caveat is important, though not vitiating. What it means is that because we are dealing with abstractions we must of necessity lose something in the realm of particulars. In what it does a taxis will be far more precise than a cosmos, this because its concern is particular ends and means. However, because its scope will be limited to particulars, that scope will be

considerably smaller than that of a cosmos which deals in abstractions and generalities.³⁸ Thus, while the cosmos loses something in the detail with which it deals, it more than makes up for that loss in the breadth of its scope.

To this point our concern has been with the spontaneous order at its most general level, to wit as a sort of genus. However, in order to fully grasp the ways in which Hayek utilizes the spontaneous order we must also give some thought to two more particular versions of it, versions which might be thought of as species. The first of these can be dispensed with quite quickly. It is what Hayek calls the Great Society, or sometimes the Open Society.

The Great Society is simply a spontaneous order which has expanded in size far beyond that of a tribal or closed society.³⁹ Contemporary western societies such as the U.S.A. and the U.K. constitute Great Societies, or would so constitute to the extent that they remained spontaneous orders. Because of the vast size of a Great Society it has an enormous, albeit greatly fragmented, pool of knowledge with which to deal. And it is this expanded pool of knowledge which "constitutes the distinctive feature of all advanced civilizations."⁴⁰ The other distinguishing feature of the Great Society is its extension of equal respect to all human beings within its physical jurisdiction.⁴¹ Whereas the tribal society considered blood the key to membership, the Great Society treats membership in the human race as the key. The Great Society is, in short, Hayek's utopia. While he admits that it is always open to improvement, he yet considers it at the pinnacle of human achievements.

It is only if we accept such a universal order as an aim, that is, if we want to continue on the path which since the ancient Stoics and Christianity has been characteristic of Western civilization, that we can defend this moral system as

superior to others -- and at the same time endeavour to improve it further by continued immanent criticism.⁴²

The other particular type of spontaneous order to which we must devote some attention is what Hayek calls the catallaxy. The catallaxy is simply a spontaneous order which takes the form of a market economy.

From this we can form an English term catallaxy which we shall use to describe the order brought about by the mutual adjustment of many individual economies in a market. A catallaxy is thus the special kind of spontaneous order produced by the market through people acting within the rules of the law of property, tort and contract.

Now, it is not my intent to engage in any in depth analysis of Hayek's economic theory. That is a topic unto itself, and quite distinct from his critique of social justice. Nonetheless, if we are to have even a general understanding of Hayek's social system it is necessary to at least note the major points he makes concerning the catallaxy.

The first point to be noted is that, while we speak of a market economy, the catallaxy is not in fact a genuine economy. A true economy aims at some particular end, and this a catallaxy, as a spontaneous order, does not do. Instead, "it serves the multiplicity of separate and incommensurable ends of all its separate members."⁴⁴ In fact, rather than concentrating on any single end, the catallaxy is ideally suited for allowing different ends to become compatible with each other.

It is indeed characteristic of such acts of exchange that they serve different and independent purposes of each partner in the transaction, and that they thus assist the parties as means for different ends. The parties are in fact the more likely to benefit from exchange the more their needs differ. While within an organization the several members

will assist each other to the extent that they are made to aim at the same purposes, in a catallaxy they are induced to contribute to the needs of others without caring or even knowing about them.⁴⁵

This last point is particularly worth stressing, In the catallaxy men further the interests of others by pursuing their own ends.⁴⁶ Hence, rather than having any one end, the catallaxy might be said to have as many ends as there are members of the catallaxy.

The easiest way to understand the way in which the catallaxy functions is to think of it as a wealth producing game.⁴⁷ The game is played through a combination of skill and luck. And the role of the latter in particular must not be under-estimated. "The element of luck is as inseparable from the operation of the market as the element of skill."⁴⁸ The significance of the element of luck is that it explains why disappointments are inevitable in the catallaxy.⁴⁹ No matter how well someone plays the game, his skill can always be offset by bad luck.

What the catallaxy attempts to achieve is to apportion the limited resources of a society in the most efficient way possible.⁵⁰ Given that there is no single end in the catallaxy, this task is both especially important and especially difficult.

What it tends to bring about is merely a state of affairs in which no need is served at the cost of withdrawing a greater amount of means from the use for other needs than is necessary to satisfy it. The market is the only known method by which this can be achieved without an agreement on the relative importance of the different ultimate ends, and solely on the basis of a principle of reciprocity through which the opportunities of any person are likely to be greater than they would otherwise be.⁵¹

One important and frequently misunderstood aspect of the catallaxy is the role of prices. In the task of apportioning limited resources prices serve the role of a signal as to what ought to be done, rather than the role of a reward for what has been done.⁵² A rise or fall in prices is an indication of where the limited resources of a society should be directed, rather than a reward or sanction for the way one has played the game. Thus, prices must be seen as forward looking rather than backward looking.

Just as the catallaxy does not aim at any particular end, neither can it be said to produce any particular result. What it does produce is a maximization of the chances of any particular individual having his expectations fulfilled.

A policy making use of the spontaneously ordering forces therefore cannot aim at a known maximum of particular results, but must aim at increasing, for any person picked out at random, the prospects that the overall effect of all changes required by that order will be to increase his chances of attaining his ends.⁵³

Thus, while the catallaxy can be said to benefit no one in particular, it can equally be said to benefit everyone in general.

The final point to be noted about the catallaxy is one which is of especial importance for the critique of social justice. In the catallaxy there is no deliberate distribution of wealth. Though income and wealth are produced by the catallaxy, they are not subject to any specific distribution. Rather, they are apportioned in accord with the results of the catallaxy game.

There is no need morally to justify specific distributions (of income or wealth) which have not been brought about deliberately but are the outcome of a game that is played because it improves the chances of all. In such a game

nobody 'treats' people differently and it is entirely consistent with respecting all people equally that the outcome of the game for different people is very different.⁵⁴

As we shall see in a later chapter this element of the catallaxy is crucial to Hayek's rejection of the demand for distributive justice.

Now, one very brief point remains to be made about the spontaneous order in general. And that is the relationship between liberty and the spontaneous order. Hayek is a great champion of respect for individual liberty. The entire first part of The Constitution of Liberty⁵⁵ is a polemic on the value of liberty. And, while Hayek's championing of liberty is a fact of which we must be aware in this work, his actual defense of liberty is a separate and distinct topic far beyond the scope of this dissertation. For our purposes it is here sufficient merely to note the following. First, Hayek places great value on respect for liberty. Second, the spontaneous order needs a wide scope of liberty in order to function. This is because the spontaneous order depends on unknown people in unforeseen situations being able to act on the basis of the knowledge which they possess. Third, liberty in turn needs the spontaneous order if it is to flourish. Liberty is meaningful only if people know the extent to which they are free and are secure in the realm of freedom allotted to them. And this, as we shall soon see, is accomplished by the rules of just conduct which constitute the spontaneous order.

The only thing which remains to be done in this analysis of the spontaneous order is to draw certain conclusions from what we have discussed. And those conclusions can be stated very succinctly. Beware of tinkering with the spontaneous order. According to Hayek deliberate tinkering with the spontaneous order should be undertaken only rarely and only with extreme caution. The problems presented by interference with

the spontaneous order are twofold. First, because society has gradually evolved in a piecemeal and undirected fashion, it may often be the case that the raison d'être of existing institutions has long since been lost to living memory. But this does not necessarily mean that the institution no longer serves an important function. Hence, any change may threaten an institution which serves a critical function in society. The second source of problems presented by deliberate interference with the spontaneous order is tied in to Hayek's espousal of critical rationalism. Given the limits of human knowledge envisioned by critical rationalism, it is impossible to foresee all of the ramifications of any proposed change in the spontaneous order. Hence, any grandiose attempts to improve the spontaneous order may very well have adverse consequences in the long run. Thus, Hayek is of the opinion that, in light of these two problem areas, any interference with the spontaneous order should be undertaken only after careful consideration and only with great caution, and should, moreover, be quite limited in scope.

And with that we have touched upon all of the major aspects of the spontaneous order. It must be emphasized that the discussion has of necessity been quite superficial. The idea of the spontaneous order is very involved and it could not possibly be comprehensively analyzed in a single chapter. And yet a single chapter is all that I can afford in this work. What I have tried to do, therefore, is to present a sufficiently accurate picture of the spontaneous order to allow us to consider the other aspects of Hayek's social system. And with the next chapter we shall begin our examination of the first of those aspects.

CHAPTER THREE

RULES OF JUST CONDUCT

We have chosen the term 'rules of just conduct' to describe those end-independent rules which serve the formation of a spontaneous order¹

If the spontaneous order can be said to constitute the basic structure of Hayek's social system, the rules of just conduct can be considered the building blocks from which the body of that system is constructed. Until we have come to understand the idea of rules of just conduct, we can have no hope of understanding Hayek on Law and Justice. Yet surprisingly, given the fundamental position of rules of just conduct in his social system, Hayek provides no comprehensive statement on the meaning of this concept. He apparently relies instead on our being able to garner the essence of this concept from the varied and multiple uses he makes of it in his argument. But that is no easy task. For that reason I have in this chapter attempted to bring together all of the disparate elements which comprise rules of just conduct so as to produce a comprehensive and coherent picture of that concept.

A. The Basic Nature and Function of the Rules.

When Hayek speaks of rules he means "simply a propensity to act or not act in a certain manner, which will manifest itself in what we call a practice or custom."² The rules of just conduct are those propensities to action/inaction which serve as the cement which joins individuals into a society. Thus,

The cultural heritage into which man is born consists of a complex of practices or rules of conduct which have prevailed because they have made a group of men successful but which were not adopted because it was known that they would bring about desired effects.³

In addition to the fact that such rules are not adopted with any particular purpose in mind, another basic characteristic is that initially, at least, they are manifested solely in patterns of behavior and not in any verbal formulation.⁴ That is to say, while individuals act in accordance with such rules, they do not, and perhaps could not, articulate the rules which they observe.

The general form of the rules of just conduct can be best understood by comparing them to two quite different concepts: commands (specific directives) and rules of organization. The difference between the rules of just conduct and commands can be readily grasped and obviously turns on the very idea of a 'rule'. Rules of just conduct establish an abstract pattern of behavior. They provide that in a certain type of situation a certain type of behavior is required or prohibited. By contrast, commands deal with very specific situations. A command requires that in this particular situation this particular behavior is required or prohibited.

The difference between rules of just conduct and rules of organization turns on the fact that, as we have seen in the preceding chapter, the spontaneous order has no determinate purpose. It is instead an order in which individuals with diverse purposes are able to co-exist. As the building blocks of such an order the rules of just conduct are ipso facto purpose-independent. As noted above, they "were not adopted because it was known that they would bring about desired effects."⁵ And since they have no determinate purpose, these rules must deal with general situations in a general way.

[Rules of just conduct] must be independent of purpose and be the same ... at least for whole classes of members not individually designated by name. They must ... be rules applicable to an unknown and undeterminable number of persons and instances.⁶

Rules of organization, on the other hand, are tied to a particular organization (such as government), and they exist to carry out the specific purposes of that organization.

In an organization there must be rules for the performance of assigned tasks. The rules will thus regulate merely the detail of the action of appointed functionaries or agencies of government... Rules of organization are thus necessarily subsidiary to commands, filling in the gaps left by commands.⁷

In stressing the purpose-independent nature of the rules of just conduct, however, it is essential to understand what Hayek means by purpose. Speaking of law, Hayek refers to "the usual sense of purpose, namely the anticipation of a particular, foreseeable event" ⁸ It is in this sense that rules of just conduct are purpose-independent. But there is also another sense of the word "purpose": "the aiming at conditions which will assist the formation of an abstract order, the particular contents of which are unpredictable ..." ⁹ In this latter

sense of the word, the rules of just conduct are not purpose-independent, but rather multi-purpose.

The rules of conduct which prevail in a Great Society are thus not designed to produce particular foreseen benefits for particular people, but are multi-purpose instruments developed as adaptations to certain kinds of environment because they help to deal with certain kinds of situations.¹⁰

It is as such multi-purpose instruments that the rules of just conduct are ideally suited to serving their function.

Viewed in the broadest sense possible the function of the rules of just conduct is to govern the actions of a group or society. Or, to be more accurate, their function is to so direct the actions of individuals that the individuals come to constitute a group or society. To quote again a passage cited above: "The cultural heritage into which man is born consists of a complex of practices or rules of conduct" ¹¹ Phrasing this idea yet another way, we could say that the function of the rules of just conduct is to allow the actions of different individuals to form an order.

Of course, it is not sufficient to speak only of "an order". The order produced must be conducive to a viable form of social life.

[N]ot every regularity in the behavior of the elements does secure an overall order. Some rules governing individual behavior might clearly make altogether impossible the formation of an overall order. Our problem is what kind of rules of conduct will produce an order of society and what kind of order particular rules will produce.¹²

To illustrate this point Hayek offers the example of a 'society' which had a rule providing that any individual who met another must either attempt to kill the other or flee from him.¹³ Such an order would more appropriately be called disorder, and it could hardly be said to produce a viable society.

Society can thus exist only if by a process of selection rules have evolved which lead individuals to behave in a manner which makes social life possible.¹⁴

Hence, the basic function of rules of just conduct is to so direct the actions of individuals that a viable social order is formed.

Such rules of just conduct also have another essential function. They constitute the only legitimate restraint allowed on the actions of any individual. Even the government in the exercise of its coercive powers may restrain the actions of individuals only in accord with the rules of just conduct. This restriction on government is central to Hayek's social philosophy.

The thesis of this book is that a condition of liberty in which all are allowed to use their knowledge for their purposes, restrained only by rules of just conduct of universal application, is likely to produce for them the best condition of achieving their aims; and that such a system is likely to be achieved and maintained only if all authority, including that of the majority of the people, is limited in the exercise of coercive powers by general principles to which the community has committed itself.¹⁵

In this sense the function of the rules of just conduct is similar to, if not synonymous with, the function of the Rule of Law.

Of course, having said that the rules of just conduct function as the only legitimate restraint on individual action, we must also consider how it is that they perform this function. Several different issues are involved in regard to this point. The first is the question of what types of individual action are subject to the rules of just conduct. In one sense the answer to this question is easy. Hayek tells us -- in a passage in which he slides back and forth between

rules of just conduct and law --: "only such actions of individuals as affect other persons ... will give rise to legal rules."¹⁶ This seems clear enough. Unfortunately, as Hayek himself goes on to recognize, this ostensibly black-white distinction in fact contains a rather large grey area. Thus, it readily slides into the often discussed question of the extent to which 'private' actions are a matter of public concern. Notwithstanding this large grey area, it seems to me that the distinction Hayek draws is still useful. While people may argue about what constitutes truly 'private' action, there does seem to be a consensus that whatever is truly 'private' is not a matter for public concern. Hence, we can know in theory when the rules of just conduct should come into play, although in particular cases their applicability may be moot.

Now, given that rules of just conduct are meant to apply only to those actions of an individual which affect others, the next question is specifically how do they apply to such actions. The answer is that they are, for the most part, negative in character. Only in rare instances -- usually occurring through choice or an especial situation in which the individual finds himself, e.g. the parent-child relationship -- do they prescribe specifically what the individual must do. Instead, they generally tell the individual only what he cannot do. They are, if you will, proscriptive rather than prescriptive. As Hayek says:

[T]hey normally impose no positive duties on any one, unless he has incurred such duties by his own actions¹⁷

The reason for this prescriptive-proscriptive dichotomy is tied to the fact that the rules of just conduct are purpose-independent, or, if you prefer, multi-purpose instruments. Since

they are not confined to those following particular designated

purposes, [they] can also never fully determine a particular action but only limit the range of permitted kinds of action and leave the decision on particular action to be taken by the actor in the light of his ends.¹⁸

Thus it is that the rules of just conduct do not specify the action which must be taken by an individual, but instead merely limit his range of choice.

They do this by defining a protected sphere of responsibility within which each individual is supreme. This protected sphere is concerned with all aspects which affect an individual's freedom of action, and not just the possession of material things.

The chief function of rules of just conduct is thus to tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him.¹⁹

Naturally, not everything a particular individual may desire will be included within the protected sphere of responsibility. And it is by expanding or possibly contracting the protected sphere that social change is taken into account.

The scope of the protected sphere of responsibility is delineated by identifying certain types of action which are or are not acceptable in certain types of situation. Because the rules of just conduct function on an abstract level (as we shall discuss in more detail infra), they are quite limited in what they are able to achieve. They can guarantee a certain framework within which an individual can act. But they cannot guarantee how that framework will be filled in.

[R]ules of just conduct can enable us merely to determine which particular things belong to particular persons, but not what these things will be

worth, or what benefit they will confer on those to whom they belong. The rules serve to provide information for the decision of individuals, and thus help to reduce uncertainty. They tell each individual only what are the particular things he can count on being able to use, but not what the results of his use will be so far as these depend on the exchange of the product of their [sic] efforts with others.²⁰

Despite this limitation on what the rules of just conduct are able to accomplish, their significance must not be underestimated. By delineating a protected sphere of responsibility the rules of just conduct, in effect, serve to define the realm of individual liberty. By telling an individual when and where he can act and when and where he must refrain from acting, they eliminate considerable uncertainty and go a long way towards preventing conflict and facilitating cooperation.²¹ And, by delineating a protected sphere of responsibility, the rules of just conduct also serve to establish very concrete rights and duties for individuals.

There is a sense of the noun 'right' in which every rule of just individual conduct creates a corresponding right of individuals. So far as rules of conduct delimit individual domains, the individual will have a right to his domain, and in defense of it will have the sympathy and support of his fellows. ...

Such claims, however, can be claims in justice, or rights, only in so far as they are directed towards a person or organization (such as government) which can act, and which is bound in its action by rules of just conduct ... In such circumstances the rules of just conduct will confer on some person rights and on other corresponding obligations.²²

There still remains much to be said about the rules of just conduct. However, at this point we have

concluded our survey of the basic nature and function of those rules. That being the case, a summary seems in order. And Hayek himself provides an adequate one.

The law will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans. It is usual to refer to these rules as abstract rules of conduct23

B. The Origin of the Rules

The rules of just conduct are the result initially of spontaneous or evolutionary development, rather than deliberate development. They did not originate because someone set out to establish a rule. Rather, they arose because someone acted in a particular manner which, when adopted by the relevant group as a pattern of behavior, proved conducive to the survival of the group. The pattern in question need not have been, and in all likelihood was not, deliberately adopted because it was known that it would have beneficial effects. Instead, it simply happened that the group which adopted the pattern of behavior for whatever reason in fact survived. Because the group survived, so too did the pattern of behavior. To repeat a passage previously cited:

The cultural heritage into which man is born consists of a complex of practices or rules of conduct which have prevailed because they have made a group of men successful but which were not adopted because it was known they would bring about desired effects.²⁴

In short, the rules of just conduct were not deliberately made, they just happened. Though they are the products of human action, they are not the products of human design.

The contention that the rules of just conduct are of spontaneous origin is for Hayek both an empirical and a theoretical argument. It is empirical in that he maintains that both historical study of contemporary 'developed' societies and anthropological study of contemporary 'primitive' societies demonstrate that rules of just conduct are not deliberately made but simply evolve.²⁵ It is theoretical in that the notion of spontaneous development is fully compatible with, and actually demanded by, his belief in critical rationalism.

As was discussed in the preceding chapter, Hayek maintains that the human mind is not omniscient and that there are very definite limits to what can be accomplished by human knowledge alone. The vast multitude of factors which can be relevant to any particular problem is such that no single mind, nor even any pooling of minds, can possibly grasp them all. For this reason it would be naive to contend that the complex of rules which govern the actions of individuals in any particular society was deliberately constructed. Such a contention would assume a degree of foresight far greater than that attainable by the human mind.

By contrast, the argument that the rules of just conduct are of spontaneous origin does not rely on any naive notion of omniscience. Instead, it relies on the simple test of time: only those patterns of behavior which have proved conducive to the survival of the group have persevered. Not only does this explanation not conflict with Hayek's critical rationalism, but in fact it demonstrates how, given the strictures of that epistemology, societies were able to develop.

[M]ost of the rules of conduct which govern our actions, and most of the institutions which arise out of this regularity are adaptations to the impossibility of anyone taking conscious account of all the particular facts which enter into the order of society.²⁶

One interesting off-shoot of the idea that the rules of just conduct originate from spontaneous development is the following. As we shall see in detail in the next two chapters, the rules of just conduct are the basic building blocks for Hayek's theories of Law and Justice. Because these rules originate from a spontaneous or evolutionary development, Hayek is able to set forth a sort of tertium quid in opposition to traditional natural law theory and to positivist theory. The rules of his theories of Law and Justice are distinct from those of natural law in that they are not in any sense claimed to be innate to the nature of man or the world in general. But they also are distinct from the rules of legal positivism, for they have not been deliberately posited by men; in fact, they are prior to any form of positive law. The rules of just conduct, are the result of human action -- and hence are likely to vary from group to group --, but they are not the result of human design. And it is this which makes them altogether separate and distinct from both natural law and legal positivism.

Concomitant with the spontaneous origin of the rules of just conduct is the fact that in their nascent form they are unarticulated. That is to say, because no one has deliberately constructed these rules, initially there is no verbal formulation of them, authoritative or otherwise. Instead, they are merely patterns of behavior which the members of a group observe; patterns which they have not attempted to verbalize, and probably could not verbalize even if they wished to.

[T]hey are observed in action without being known to the acting person in articulated ('verbalized' or explicit) form.²⁷

That these rules are initially unarticulated is explained by Hayek's theory of how the human mind functions. This theory is developed at length in "The Primacy of the Abstract".²⁸ To very briefly summarize that argument, Hayek maintains that the mind, rather than beginning with the particular and moving by induction to the abstract, in fact begins with broad categories of actions or situations, and it is able to grasp particulars only by fitting them into one or more of these categories.

Whenever a type of situation evokes in an individual a disposition towards a certain pattern of response, that basic relation which is described as 'abstract' is present.²⁹

The rules of just conduct present just such an abstract relation. They identify types of situations in which the members of a group have a disposition towards certain patterns of response. And it is this abstract nature of the rules of just conduct which is responsible for their originally being unarticulated.

[T]he fact that language is often insufficient to express what the mind is fully capable of taking into account in determining action, or that we will often not be able to communicate in words what we well know how to practice has been clearly established in many fields. [Footnote omitted] It is closely connected with the fact that rules that govern action will often be much more general and abstract than anything language can yet express.³⁰

However, while the rules of just conduct are originally in an unarticulated form, they do not remain forever in this form. As the rules develop over time, they also pass into articulated form. And it is to this topic that the next section of this chapter is devoted.

C. The Articulation and Development of the Rules

Whereas the genesis of the rules of just conduct is a matter of spontaneous development, their subsequent articulation and development is not. It is, instead, a matter of quite deliberate action.

Thus, although rules of just conduct like the order of actions they make possible, will in this first instance be the product of spontaneous growth, their gradual perfection will require the deliberate efforts of judges (or others learned in the law) who will improve the existing system by laying down new rules. 31

It is this "gradual perfection" of the rules of just conduct by judges or "others learned in the law" to which we now turn. For ease of discussion I will speak throughout only of judges and will presuppose a formal legal system. But, Hayek's argument is equally applicable to a 'pre-legal' society in which a sage, headman, or the like is entrusted with the interpretation of the rules of just conduct.

At the outset let me draw attention to an important point to which we will recur several times herein. Despite the reference in the passage just cited to "laying down new rules", the judges do not actually create genuinely new rules of just conduct. Rather, what they do is articulate and develop the existing rules and the existing system of rules. This latter point is important and must not be forgotten. When we are concerned with rules of just conduct we are concerned not merely with individual rules standing in isolation from each other, but also with a coherent system of rules.

The need for judges to perfect the existing rules of just conduct is directly related to the fact that these rules are initially abstract and unarticulated. Because of this these rules are at first merely

intuitive feelings that certain conduct is appropriate to certain situations. People will normally know how to act in accordance with the rules of just conduct without consciously knowing what those rules are. When, however, unusual or even novel situations arise the intuitive feelings may prove inadequate to guide conduct. And it is here that recourse must be had to judges.

[I]n more unusual situations the intuitive certainty about what expectations are legitimate will be absent. It will be in [these] situations that there will be necessity to appeal to men who are supposed to know more about the established rules if peace is to be preserved and quarrels to be prevented.³²

To resolve the problems presented by such situations, the judge attempts to articulate the applicable rules of just conduct. His task is to tell those involved

what ought to have guided their expectations, not because anyone had told them before that this was the applicable rule, but because this was the established custom which they ought to have known.³³

Thus, the judge's task is really one of discovery and not of creation. To wit, he does not create a rule which he personally deems best, or which he deems conducive to any particular, pre-ordained policy.³⁴

Rather, he attempts to discover that rule which, once it is articulated, will be considered by the parties involved to be applicable to and controlling of the matter at hand.

The explicit statement of the established practice or custom as a verbal rule would aim at obtaining consent about its existence and not at making a new rule ...³⁵

Of course, the very fact that there is need to articulate the applicable rule means that it will not be easy to discover that rule. Moreover, articulation will also be complicated by the fact that since the applicable rule is abstract, it will not readily transmute into verbal form. "The unarticulated rules will therefore usually contain both more and less than what the verbal formula succeeds in expressing."³⁶ Naturally enough, error in either direction will eventually necessitate re-articulation of the applicable rule in order to bring it into line with the abstract patterns of behavior which are observed in fact.

The rules by which men try to define kinds of actions as just or unjust may be correct or incorrect; and it is established usage to describe as unjust a rule which describes as just a kind of action which is unjust. But though this is a usage that is so general that it must be accepted as legitimate, it is not without danger. What we really mean when we say, e.g., that a rule which we all thought to be just proves to be unjust when applied to a particular case, is that it is a wrong rule which does not adequately define what we regard as just, or that the verbal formulation of the rule does not adequately express the rule which guides our judgment.³⁷

Another difficulty which the judge faces in the process of articulating the applicable rule of just conduct is that he may sometimes be confronted with a genuinely novel situation. When this happens, it may very well be that there is no established pattern of behavior; how can there be if the situation has never arisen before. It is in such instances that the judge can, in a sense, be said to make new rules of just conduct. But it is especially in such situations that we must remember that we are concerned not with isolated rules, but rather with a

coherent system of rules. Hence, even here the judge is not free literally to create whatever rule he will. He must instead discover that rule which is compatible with the existing system of rules of just conduct.

This [i.e. the judge's role as discoverer rather than creator] remains true even where, as is undoubtedly often the case, those called upon to decide are driven to formulate rules on which nobody has acted before. They are concerned not only with a body of rules but also with an order of the actions resulting from the observance of these rules, which men find in an ongoing process and the preservation of the existing order of actions towards which all the recognized rules are directed may well be seen to require some other rule for the decision of disputes for which the recognized rules supply no answer. In this sense a rule not existing in any sense may yet appear to be 'implicit' in the body of the existing rules, not in the sense that it is logically derivable from them, but in the sense that if the other rules are to achieve their aim, an additional rule is required.³⁸

To summarize to this point, the subsequent articulation and development of the rules of just conduct is achieved by means of deliberate action by the judiciary. The concern of the judiciary is, however, the development of an existing system of rules, and not a de novo creation of new rules. This is achieved through the slow process of articulating existing -- in the sense of observed -- patterns of behavior, and, when necessary, articulating new patterns of behavior which will be compatible with the system formed by the existing patterns. This process of gradual judicial development of the rules of just conduct is designated by Hayek as nomos. It should be noted that at times Hayek speaks as if nomos designates the outcome of this process of judicial development.³⁹

However, it is more in accord with his argument to limit the term to the process itself.

In addition to this nomos there is another process by which the rules of just conduct can be developed. This is the process which Hayek designates as thesis. Thesis refers to any "prescription which has been made, or 'set' or 'posited' by authority".⁴⁰ From a contemporary viewpoint it refers to enactments by a legislative body. But, while the process of thesis can be utilized to develop rules of just conduct, it need not always be so utilized. In fact, in most instances it is not. Instead its more usual function is to produce either specific directives (i.e. commands) or rules of organization. Whether in any particular instance thesis has produced rules of just conduct is basically a question of fact. It is answered by determining whether what was produced manifests the characteristics of rules of just conduct. The relationship between nomos and thesis is a topic to which I will return in greater detail in the chapter on Law. Accordingly, I will defer until then any further discussion of the thesis process. For our present purposes it is sufficient to note that while thesis is a possible way of developing the rules of just conduct it is not always utilized for this purpose.

Regardless of how the original rules of just conduct are subsequently developed, whether through nomos or thesis, there are certain restrictions on this development which must always be kept in mind. The first is one we have already noted at some length. That is, our concern is not with isolated rules but rather with a coherent system of rules. Hence, in developing and/or criticizing any particular rule of just conduct we must always move within the scope of the overall system of rules. In developing and/or criticizing any single part of that system, we must always accept the remainder of that system as a given. This process is what Hayek describes as "immanent criticism".

If we are to make full use of all the experience which has been transmitted only in the form of traditional rules, all criticism and efforts at improvement of particular rules must proceed within a framework of given values which for the purposes in hand must be accepted as not requiring justification. We shall call 'immanent criticism' this sort of criticism that moves within a given system of rules and judges particular rules in terms of their consistency or compatibility with all other recognized rules in inducing the formation of a certain kind of order of actions.⁴¹

Hayek does not specifically address the question of how much of the system can be criticized at any one time. However, given his belief in critical rationalism with its stress on the limited capabilities of the human mind, it is probably safe to say that he would advocate that criticism be kept within very narrow limits.

The second restriction on the development of the rules of just conduct is closely related to the concept of immanent criticism. This is the idea that any development of the rules of just conduct must rest upon a general coincidence of opinion as to what the rules are in fact. It will be recalled that in articulating the rules of just conduct the judge's function is to tell people what "was the established custom which they ought to have known."⁴² Thus, whether the judge has succeeded in articulating the appropriate rule will be determined in part by whether the people consent to his articulation. He aims "at obtaining consent about its existence and not at making a new rule"⁴³ This consent is a sine qua non for the successful development of the rules of just conduct.

No group is likely to agree on articulated rules unless its members already hold opinions that coincide in some degree. Such coincidence of opinion

will thus have to precede explicit
agreement on articulated rules of
just conduct⁴⁴

In fact, coincidence of opinion is really just another facet of the requirement that the judge's concern be always with existing rules and an existing system of rules, and that his function be that of discoverer and not of creator.

D. Factors Affecting the Form of the Rules

In the first section of this chapter we considered in a very general manner the nature and form of the rules of just conduct. Now, in this section and the next I wish to consider in much greater detail the form which those rules must take. The next section will be specifically devoted to the actual form of the rules of just conduct. In this section I will consider at length certain factors which have a very definite effect on the form the rules take.

The first of the factors with which we are here concerned is the inescapable fact of human ignorance. Actually, this factor affects not so much the form of the rules of just conduct as it does the very fact that we must deal with rules of just conduct. In the last chapter we examined the distinction Hayek draws between critical rationalism and constructive rationalism. It is that distinction with which we are really concerned here. Specifically, we are concerned with Hayek's contention that human reason is only of the critical variety. As we have seen several times already, he argues that there are very definite limits to the scope of human reason. The factors which can be relevant to any particular situation or course of action

are far too varied and uncertain to be grasped by any single mind, or even by a pooling of minds. Hence, to speak and act as if we could ever know all the relevant information is naive. We must, instead, realize that a large degree of ignorance is an unavoidable aspect of all rational activity. And that being so, the fact of ignorance cannot help but have a strong influence on all of our social institutions and conceptions.

The fact of our irremediable ignorance of most of the particular facts which determine the processes of society is, however, the reason why most social institutions have taken the form they actually have. To talk about a society about which either the observer or any of its members knows all the particular facts is to talk about something wholly different from anything which has ever existed -- a society in which most of what we find in our society would not and could not exist and which, if it ever occurred, would possess properties we cannot even imagine. 45

As far as our present concern, human ignorance is the raison d'être for the existence of rules of just conduct.

To judge actions by rules, not by particular results ... is the device man has tumbled upon to overcome the ignorance of every individual of most of the particular facts which must determine the concrete order of a Great Society. 46

The connection between rules and ignorance is as follows. We can never know all the facts which are pertinent to any one situation, nor can we ever know the relative importance of those few facts which we do know. Hence, were we to attempt to act solely on the basis of what we know at any particular time, our actions would be likely to have wholly unexpected if not disastrous consequences.

However, by relying on the rules of just conduct we are able to significantly lessen the likelihood of such adverse consequences. This is because, given their gradual evolution and development, the rules of just conduct are able to take into account factors which have proven relevant in the past and are, therefore, likely to prove relevant again, even if their relevance is not apparent at the precise moment of action. If, mirabile dictu, we were able to comprehend all the pertinent facts as well as their relative importance, then there would be no need for the rules of just conduct. The following passage, although it speaks in terms of justice, is precisely on point, inasmuch as Hayek's conception of justice is (as we shall see) built upon the rules of just conduct.

[I]n a society of omniscient persons there would be no room for a conception of justice: every action would have to be judged as a means of bringing about known effects, and omniscience would presumably include knowledge of the relative importance of the different effects. Like all abstractions, justice is an adaption to our ignorance -- to our permanent ignorance of particular facts which no scientific advance can wholly remove. It is as much because we lack the knowledge of a common hierarchy of the importance of the particular ends of different individuals as because we lack knowledge of particular facts, that the order of the Great Society must be brought about by the observance of abstract and end-independent rules. 47

The second factor which affects the form which the rules of just conduct take is the scope of what Hayek calls the Great or Open Society. When men lived in small tribal or clan societies it was quite feasible for each individual to know a great many of the other individuals in that society very well. In such a society an individual could know well the needs and desires, merits and demerits, abilities and

deficiencies of his fellows. Because an individual could reasonably be expected to be familiar with such aspects of his neighbors' personalities, the rules which evolved in such a society could take such aspects into account. That is, they could impose duties which were integrally related to another's needs, merits, abilities, etc.

However, as societies developed their scope expanded greatly. Because of the vast numbers of individuals making up any contemporary Western Society -- and such are the focus of Hayek's concern -- it is no longer possible for an individual to know the majority or even a significant minority of his fellows intimately. In fact, an individual will know well, i.e. in the sense of a tribal society, only a relatively few others. Given this, it will be necessary for the rules of just conduct to be divorced from all of those particulars about his fellows which an individual cannot reasonably be expected to know. Hence, if an individual cannot be expected to know the needs, merits, abilities, etc. of his fellows, the rules of just conduct cannot impose upon him duties which relate to such factors.

If a person's legal duties are to be the same towards all, including the stranger and even the foreigner (and greater only where he has voluntarily entered into obligations, or is connected by physical ties as between parents and children), the legally enforceable duties to neighbor and friend must not be more than those towards the stranger. That is, all those duties which are based on personal acquaintance and familiarity with individual circumstances must cease to be enforceable. 48

In short, as a society develops from a tribal into a Great Society, the rules of just conduct "must progressively shed their dependence on concrete ends, and by passing this test become gradually abstract and negative" 49

The third and final factor which affects the form of the rules of just conduct is Hayek's belief that society is a cosmos or spontaneous order. As such it has evolved gradually through the actions of many individuals, each acting on the basis of his own knowledge and his own ends. Given that the cosmos is an adaptation to limited human knowledge, and given that limited knowledge is a problem which can never be surmounted, it is essential in order for society to continue to develop favorably that it continue as a cosmos. And this it can do only if unknown individuals retain the ability to react as they think appropriate to unforeseen and unforeseeable circumstances. For this reason the rules of just conduct must be such as to facilitate this spontaneous development of society. To do this they must maximize the scope of individual liberty so that an optimal opportunity is provided for the utilization of individual knowledge. And this they accomplish by defining and guaranteeing a protected sphere of responsibility within which the individual is able to act, secure from the interference of others.

And with that we are now ready to move on to a consideration of the specific form which the rules of just conduct must take.

E. The Form of the Rules

The purpose of this section is twofold. The first is to examine the form which Hayek maintains that the rules of just conduct must take. However, concomitant with that purpose is a second one. That is to show that, given the restrictions on the form which the rules of just conduct must take, the charge that Hayek is concerned purely with the form of the rules to the exclusion of any concern with substance is

unwarranted. As will be seen shortly, there are a number of factors which help to circumscribe the form of the rules. Hence, while Hayek might, in the opinion of some, place undue stress on the need for rules per se, it is wrong to say that he gives absolutely no concern to the content of those rules. On the contrary, the parameters of the rules of just conduct are such that the possible content of those rules is indeed to some degree limited.

Let us begin with a point to which we have already referred on several occasions. The rules of just conduct should be abstract in form.

We have seen earlier ... how from the process of gradual extension of rules of just conduct to circles of persons who neither share, nor are aware of, the same particular ends, a type of rule has developed which is usually described as 'abstract'.⁵⁰

But precisely what is meant by "abstract"? Hayek continues: "What is meant by the term abstract is expressed in a classical juridical formula that states that the rule must apply to an unknown number of future instances. [Footnote omitted]"⁵¹ The notion of abstract is further elucidated in the footnote to this sentence which reads in part as follows:

In a general way this idea ... has been expressed especially by William Paley in his Principles of Moral and Political Philosophy (1785, new ed. London 1824), p. 348: 'general laws are made ... without foreseeing whom they might affect' and recurs in its modern form in C. K. Allen, Law in the Making (6th ed., London, 1958) p. 367: 'a legal rule, like every kind of rule, aims at establishing a generalisation for an indefinite number of cases of a certain kind.'⁵²

What Hayek means by abstract is closely related to, if not synonymous with, an idea which we

considered in the first section of this chapter: to wit, rules of just conduct must be purpose-independent. That is, they are not directed to any "particular foreseeable event"⁵³ but instead aim "at conditions which will assist the formation of an abstract order, the particular contents of which are unpredictable"⁵⁴ To assist the formation of such an abstract order, the rules must "apply to an unknown number of future instances."⁵⁵

The need for the rules of just conduct to be abstract is directly related to Hayek's view of society as a cosmos. Only rules which are abstract in the sense just described will allow the continued spontaneous functioning of society. If the rules did not apply to unknown future instances, then logically they would have to apply to specifically foreseen situations. But if that were so, they would be more akin to commands and directives than to rules. And, in that case they would seriously limit the opportunity for unknown individuals to embark on untried courses of action in unforeseen circumstances, thereby significantly interfering with the spontaneous functioning of society. In short, the rules of just conduct must be abstract if society is to continue to develop spontaneously.

In addition to requiring that they be abstract, Hayek also says that the rules of just conduct must be general. However, by "general" he appears to intend at least three different ideas. In one sense "general" seems to be synonymous with the notion of abstract, which we have just considered. For example, shortly after the last passage referred to above, Hayek says:

In the terms we have adopted this means that the general rules of law that a spontaneous order rests on aim at an abstract order, the particular or concrete content of which is not known or foreseen by anyone⁵⁶



In this sense, to require that the rules of just conduct be general means only that they apply to an unknown number of future instances.

Another sense in which Hayek uses general is as a synonym for universal. For instance, in The Mirage of Social Justice he has a section in Chapter Seven headed "'Generalization' and the test of universalizability". Therein he states:

In fact, used as a test of the appropriateness of a rule, the possibility of its generalization or universalization amounts to a test of consistency or compatibility with the rest of the accepted system of rules or values. 57

This sense of generality we have already discussed in connection with the nomos process. As a synonym for universal, general can also mean simply that the rule must be applied to all situations which come within its scope. But this notion is inherent in the very idea of rule, and so adds little to our understanding of what Hayek requires for the rules of just conduct.

Probably the most important sense in which Hayek uses general is that in which general can be distinguished from universal. To call a rule universal is to do no more than say that it applies to all situations which fall within its scope. But to call a rule general is to say something about the breadth of its scope. Thus, a rule can be universal and yet not be very general. Consider, a rule which prohibits all employment discrimination against blacks would, if properly applied, be universal. However, it would not be nearly as general as a rule which prohibited employment discrimination on the basis of race or national origin.

From this example it should be clear that universality is an absolute criterion -- a rule is either universal or it is not, there are no degrees of universality. By contrast, generality is a relative criterion -- a rule is more general or less general, but

it is hard to see how it could be simply general. In this sense, when Hayek contends that the rules of just conduct should be general, he often means that they should have a very broad scope, i.e. that they should be more general.

The evident difficulty with applying this criterion is to determine what constitutes more general. When is a rule general in this sense and when is it not? There is no clear answer. Certainly if the scope of a rule were so narrow as to allow ready identification of those individuals affected thereby, Hayek would say that it was not general. But it appears that he would also condemn as not general rules which are not defective in this sense. For instance, in The Constitution of Liberty he attacks the policy of progressive taxation in part because it is not a general rule.⁵⁸ He would prefer instead proportional taxation by which everyone was taxed at the same rate. This example suggests that for Hayek a rule is not general unless its scope encompasses literally everyone. This approach seems extreme to say the least, yet it is arguable that it is what Hayek intends. Certainly he intends that the rules of just conduct must have a broad scope, but precisely how broad a scope he requires must remain a moot point.

The final criterion which Hayek prescribes for the rules of just conduct is of a much more specific nature than those we have heretofore considered. The criteria we have considered so far have all been generic in nature. They most certainly affect the content of the rules, but they do so only indirectly. However, the criterion we are about to consider is directly concerned with the content of the rules of just conduct.

Specifically, Hayek maintains that in any Great Society the rules of just conduct must establish certain indispensable concepts: i.e. what might be called property, contract, and tort.

It would seem that wherever a Great Society has arisen, it has been made possible by a system of rules of just conduct which included what David Hume called 'the three fundamental laws of nature, that of stability of possession, of its transference by consent, and of the performance of promises', (Footnote omitted] or, as a modern author sums up the essential content of all contemporary systems of private law, 'freedom of contract, the inviolability of property, and the duty to compensate another for damage due to his fault.' [Footnote omitted] 59

Or, as Hayek more succinctly puts it: "Law, liberty, and property are an inseparable trinity." ⁶⁰ However, to merely tell us that the rules of just conduct must establish these concepts really tells us very little, for each of these concepts is open to a very wide range of interpretations. Nonetheless, that is all that Hayek tells us. Hence, while we can be certain that the rules of just conduct must establish the concepts of property, contract, and tort, we can only speculate as to what Hayek intends by these concepts.

To sum up. We have seen that the rules of just conduct must be abstract, in that they apply to unknown numbers of future instances. We have seen that they must be general, in that they are abstract, in that they are universal, and in that they have a broad scope of application. Finally, we have seen that they must establish the concepts of property, contract, and tort, whatever those concepts might mean. Taken together, these factors quite clearly do not dictate what the content of the rules of just conduct must be. On the other hand, they do circumscribe to some extent the range of possible rules. Thus, while Hayek is not specifically concerned with the rules of just conduct, it is not altogether fair to say that he is totally unconcerned therewith.

And with that we come to the conclusion of this survey of the concept of rules of just conduct. As I have already indicated they are the basic building block of Hayek's social system, and we shall have much recourse to them in the next two chapters which deal with Law and Justice.

CHAPTER FOUR

LAW

"The law will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each enable an order of actions to form itself wherein the individuals can make feasible plans." ¹

A. An Ideological Theory

In examining Hayek's thoughts on law there is a threshold question which must be considered at the outset: and that is, whether what Hayek says is descriptive or normative or both. From the general tenor of the argument there seems little doubt that in Hayek's own mind what he says is both descriptive and normative. Or perhaps it is more accurate to say that Hayek sees no distinction. What he describes is what is entailed by the concept of law. And, therefore, if a society is to have law, it must have what Hayek describes.

The difficulty with this all or nothing approach is that it leaves one in a dilemma similar

to that attributed (wrongly according to John Finnis)² to classical Natural Law theory. There it is frequently claimed that an unjust law is no law at all. With Hayek the comparable statement would be that a society which does not have law as he describes it does not have law at all. Of course, I strongly suspect that Hayek would not consider this a dilemma. Rather, he would say it is a tautology, it is an analytic statement about the meaning of law.

However, this approach is, in fact, incompatible with one of Hayek's own arguments. In The Mirage of Social Justice Hayek considers at some length Hans Kelsen's Pure Theory of Law.³ He concludes:

Legal positivism is in this respect simply the ideology of socialism ... and of the omnipotence of the legislative power. It is an ideology born out of the desire to achieve complete control over the social order⁴

Recognizing that this conclusion contradicts Kelsen's claim to have formulated a value-free theory of law, Hayek goes on to say:

The characterization of Kelsen's pure theory of law as an ideology is here not meant as a reproach, though its defenders are bound to regard it as such. Since every social order rests on an ideology, every statement of the criteria by which we can determine what is appropriate law in such an order must also be an ideology. The only reason why it is important to show that this is also true of the pure theory of law is that its author prides himself on being able to 'unmask' all other theories of law as ideologies [Footnote omitted] and to have provided the only theory which is not an ideology... Yet, since every cultural order can be maintained only by an ideology, Kelsen succeeds only in replacing one ideology with another that

postulates that all orders maintained by force are orders of the same kind, deserving the description (and dignity) of an order of law, the term which before was used to describe a particular kind of order valued because it secured individual freedom. Though within his system of thought his assertion is tautologically true, he has no right to assert, as he constantly does, that other statements in which, as he knows [Footnote omitted], the term 'law' is used in a different sense, are not true. What 'law' is to mean we can ascertain only from what those who used the word in shaping our social order intended it to mean, not by attaching to it some meaning which covers all the uses ever made of it. 5

The point is, this passage is equally applicable to Hayek's own theory of law. But where Kelsen's theory of law is interlocked with socialism, Hayek's is interlocked with liberalism. The above passage admits as much where it speaks of law as "the term which before was used to describe a particular kind of order valued because it secured individual freedom."⁶ Why then belabor the point?

I do so because it seems to me that at times Hayek himself either forgets or at least glosses over the fact that his theory of law is ideologically based. In criticizing various aspects of contemporary society, particularly aspects relating to government and the welfare state, he often seems to take the ideology as a given and then criticizes actions as incompatible with that ideology. For instance, as we shall see later, a major part of his critique of social justice rests on its alleged incompatibility with respect for liberty.

To the extent that such an argument recognizes that the ideology it presupposes is in a sense optional; in that there is no logical requirement that any particular person espouse it, all well and good.

However, to the extent that the argument fails to recognize that the ideology it presupposes may not and need not be the dominant ideology in the society in question, it is misleading. It misleads in ignoring its own hypothetical aspect -- if you value X, then you must do Y --; it suggests a categoricalness or necessity to its conclusions which is not in fact present or justified.

To be more specific, in examining Hayek's theory of law there is one point which we must keep in mind at all times. It is a point which Hayek would undoubtedly readily grant if specifically asked, and yet one which he often allows to fade into the background in the course of his arguments. That point is: the theory of law which Hayek explicates is one which is -- or so Hayek argues -- entailed by liberalism. It is a (the?) Liberal Theory of Law. If one accepts the ideology of liberalism, then Hayek's theory is tautological; if one accepts the ideology, then a society which does not have law in the sense that Hayek describes does not have law at all. (This assumes, of course, that independent of the ideology Hayek's argument is persuasive and viable.) But that "if" must always be kept in mind. Many of the problems which Hayek sees in contemporary society may well result, not because people have forgotten what is required by liberalism, but rather because they no longer espouse liberalism as an ideology. And the latter problem is quite different from the former.

To a certain extent I may be going to great lengths to state the obvious. Since at least The Road to Serfdom Hayek has been issuing a jeremiad about the abandonment of liberalism by western societies. And, both The Constitution of Liberty and the early chapters of Law, Legislation and Liberty are concerned with demonstrating why the ideology of liberalism should be espoused. Nonetheless, I know from experience that it is far too easy when one comes to grips with the

details of Hayek's positions on law, justice, and social justice to forget the ideological basis presupposed by his argument. This not least because Hayek himself allows his ideological basis to disappear into the background.

Consider, for example, the end of the passage quote above.

What 'law' is to mean we can ascertain only from what those who used the word in shaping our social order intended it to mean⁷

I would say, rather, what those who shaped out social order meant by law is relevant to what we mean by it only if we espouse the same ideology as they. The theory cannot be divorced from the ideology: "every statement of the criteria by which we can determine what is appropriate law in such an order must also be an ideology."⁸

In sum, Hayek's theory of law, though it may be descriptive in part, is primarily normative. It is not a value-free theory of law, but rather a statement of what must be meant by law in a liberal society. It is for this reason that Hayek can say: "Liberalism is therefore the same as the demand for the Rule of Law"⁹

B. The Nature of Law

The essence of Hayek's conception of law can be found in three contrasting pairs of ideas. The three are:

1. rules of just conduct v rules of organization
2. nomos v. thesis
3. law v. morality

Once these three sets of distinctions have been analysed, we can then consider the function of law in a liberal society.

Inasmuch as the preceding chapter dealt specifically with the contrast between rules of just conduct and rules of organization, I will not here go into that contrast in any great detail. Instead I will merely recount the highlights of that distinction. Rules of organization are relatively specific, both in what they prescribe and in whom it is they prescribe to. They are purpose-dependent, that is their function can be understood only in regard to a pre-ordained end. They are closely related to commands and serve primarily to fill in gaps left by a hierarchy of commands. Lastly, they are inevitably the result of deliberate positing.

By contrast, rules of just conduct are general, purpose-independent rules, usually negative in form. They are the cement which holds individuals together in a social order. They do so by delineating a protected sphere of responsibility within which the individual is supreme, thereby providing maximum opportunity for the pursuit of a variety of ends. Rather than being deliberately established, they evolve, consisting initially of unarticulated, abstract patterns of behavior. Over time they are articulated, usually by men considered particularly familiar with the rules and skilled in the technique of articulation. But they can also be articulated by what we would today call legislative bodies.

The distinction between rules of just conduct and rules of organization is important to Hayek's conception of law because the former are a necessary though not sufficient component of that conception, while the latter are expressly excluded from that conception. Thus, for Hayek all law consists of rules of just conduct. However, as we shall see shortly, not all rules of just conduct are law.

Another aspect of Hayek's conception of law is found by comparing nomos with thesis. Now we did consider nomos and thesis in the preceding chapter, but additional consideration is nonetheless warranted here. Although there will of necessity be some overlap between the two discussions, repetition will be kept to a minimum.

While the rules of just conduct-rules of organization distinction deals with the form the rules in a social order take, the nomos-thesis distinction deals with the procedure by which those rules are articulated. It is essential to keep in mind that at heart the nomos-thesis distinction is one of procedure. I stress this because at times Hayek himself blurs this fact.

At times one is given the impression that nomos is synonymous with rules of just conduct. For instance, in speaking of early legislative bodies Hayek says: "They were not primarily concerned with the rules of just conduct or the nomos" ¹⁰, and the context makes it clear that the "or" is conjunctive. But if nomos and rules of just conduct are one and the same, then the nomos-thesis distinction would appear to be simply the rules of just conduct-rules of organization distinction.

That this can be the essence of that latter distinction seems dubious when we consider Hayek's quite explicit definition of thesis:

There is no single term in English which clearly and unambiguously distinguishes any prescription which has been made, or 'set' or 'posited' by authority from one which is generally accepted without awareness of its source. ... When we need a precise single term we shall occasionally employ the Greek word thesis to describe such 'set' law. ¹¹

Clearly the emphasis here is on the procedure from which

a prescription (rule) results rather than on the form which the prescription takes. That this analysis is correct is confirmed in the following passage.

A statute (thesis) passed by a legislature may have all of the attributes of a nomos, and is likely to have them if deliberately modelled after the nomos. But it need not and in most of the cases where legislation is wanted it cannot have this character. In this chapter we shall consider further only those contents of enactments or thesis which are not rules of just conduct. ¹²

Thus, thesis can result in rules of just conduct, and there is no way that this could be the case if the nomos-thesis distinction were the same as the rules of just conduct-rules of organization distinction. No, the distinction must hinge on the procedure from which the rules result.

In the last chapter we discussed at great length the essence of the nomos procedure and there is certainly no need to repeat that discussion again. Suffice it here to simply summarize the highpoints of that discussion. Nomos is the process of gradual articulation and development of the rules of just conduct by the judges or others learned in the law. It is a process of discovery rather than creation, whereby the judge attempts to articulate the underlying pattern of behavior which should have guided the conduct of the parties before him. In those rare cases where there is in fact no underlying pattern of behavior which is applicable, the judge attempts to articulate a rule which is compatible with the overall system of rules with which he is working, a rule which can be said to be implicit in that system. In short, for Hayek the essence of nomos is judge-made law and its exemplar is the English Common Law. ¹³

Inasmuch as rules of just conduct are an aspect of Hayek's conception of law, so too is nomos, for we cannot truly understand the notion of rules of just conduct without understanding how they develop.

Now, while understanding nomos is a very important part of understanding rules of just conduct, and hence of understanding law, we cannot altogether ignore the role of thesis. Thesis too has a part to play in understanding Hayek's conception of law. Compared to the multi-layered nomos process, the thesis process, as we have already seen, is relatively straightforward. Thesis denotes prescriptions which have "been made, or 'set' or 'posited' by authority" ¹⁴ Or, to maintain a symmetry with nomos, it might be better to think of thesis as the process by which rules are made or set or posited by authority.

When I spoke of thesis just now, I spoke only of rules. At that point in my argument it was acceptable to ignore any distinction between types of rules. But a distinction must now be made, for it is crucial not only to Hayek's conception of law, but to his general political theory as well.

Let us consider "prescription" as a generic name for what results from the thesis process. Prescriptions can then be subdivided into two categories: rules of just conduct and rules of organization. When the thesis process results in rules of just conduct, its outcome will be the same as that of the nomos process. And it is to that extent that Hayek can talk of a thesis which has "all of the attributes of a nomos". ¹⁵ Like nomos, the outcome of such thesis is law -- holding aside for the moment one further aspect which remains to be considered.

The essential point here is that the thesis process does not necessarily result in rules of just conduct. In fact, more often than not, it results in

rules of organization. Why this is so is not difficult to explain. In a democracy the legislature, the representative body which engages in the thesis process -- the only body which engages in the thesis process --, is the primary administrator of government. And government is an organization, a taxis not a cosmos, and naturally it functions as an organization.

Government, by contrast, is a deliberate contrivance
[I]t will require distinct rules of its own which determine its structure, aims, and functions. ... They will be rules of organization designed to achieve particular ends, to supplemt positive orders that something should be done or that particular results should be achieved, and to set up for these purposes the various agencies through which government operates. 16

Because thesis can result in either rules of just conduct, or rules of organization, and because it is more likely to result in the latter than in the former, a problem arises which manifests itself in two related ways. The first is, given that a single body is responsible for both rules of just conduct and rules of organization, there is a tendency to confound the two, to describe both as law, and to confer on both the status due properly only to law.

But since the enforcement of the law was regarded as the primary task of government, it was natural that all the rules which governed its activities came to be called by the same name. This tendency was probably assisted by a desire of governments to confer on its [sic] rules of organization the same dignity and respect which the law commanded. 17

The second way in which the problem manifests itself is that a representative body, primarily concerned with running the government, and to that end

issuing rules of organization, can readily become accustomed to the practice of running an organization and come to think of its function as including the running of society.

Increasingly and inevitably an assembly occupied in the former way [i.e. directing government] tends to think of itself as a body that not merely provides some services for an independently functioning order but 'runs the country' as one runs a factory or any other organization. ¹⁸

In short, there is a strong tendency for the representative body to treat the cosmos as a taxis, and in so doing to actually convert it into one.

Under either manifestation the heart of the problem is the blurring of the distinction between rules of just conduct and rules of organization. It is the tendency to treat any prescription which results from the thesis process as having "all of the attributes of nomos". And the reason this is a problem is that it renders meaningless a basic principle of a liberal society, namely "limiting all coercion to the enforcement of rules of just conduct."¹⁹ This relationship between law and coercion will be further discussed below. For now, it is sufficient to note that the ambiguous nature of the thesis process can lead to the coercive enforcement not only of rules of just conduct, but of rules of organization as well.

Given this problem inherent in the thesis process, it might be wondered why thesis is ever utilized to develop the rules of just conduct. Might it not be better to limit thesis solely to the promulgation of rules of organization and to rely solely on nomos to develop the rules of just conduct. The answer is quite simply "no". Notwithstanding the problem which results from the ambiguity inherent in thesis, there are good reasons to utilize thesis in the development of rules of just conduct.

As the rules of just conduct develop from an unarticulated to an articulated form two types of situations can arise in which thesis is necessary to assist nomos in the process of development. Occasionally, over a period of time the rules of just conduct may develop in such a way that they suddenly seem to be leading in a wrong direction, or even to a dead end.²⁰ This situation may result from a simple error in the nomos process at some stage.²¹ Or, it may result from a more general error, in that a concern with the interests of some particular group or class in a society has resulted in rules, which are not in fact general, purpose-independent rules, being treated as rules of just conduct.²² The adage "what's good for General Motors is good for the country" comes to mind, although Hayek would probably not agree with that example.

The other situation which necessitates recourse to thesis occurs when "wholly new circumstances" arise.²³ Such circumstances might be a major change in the physical environment or they might be a major change in the technology of a society. More generally, they represent a change so radical or so basic that the existing rules of just conduct cannot cope. Genetic engineering and computer technology are good examples of areas which today are presenting just such problems.

In neither of these situations is the nomos process suitable for adapting the rules of just conduct. This for two reasons. First, nomos is by nature a slow, gradual process, proceeding on a case by case basis.²⁴ This very gradualness is, in fact, one of its positive qualities, for it allows time to test by experience the soundness of each step in the process of development. But because it moves slowly, because it always deals with particular cases, nomos is not well suited to making radical changes in direction.

The second reason why nomos is ill-suited to adapting the rules of just conduct to the situations described above is more a function of the role nomos plays in the social order than of the nature of nomos itself. As has already been noted, in resolving a dispute the judge's task is to tell the parties

What ought to have guided their expectations, not because anyone had told them before that this was the applicable rule, but because this was the established custom which they ought to have known. 25

Now, once a rule has been articulated by a judge it is not merely reasonable, but in fact demanded, that henceforth that rule be one factor which guides parties' expectations. And for that reason any major change in the direction of the rules of just conduct is virtually certain to disappoint someone's expectations. And this the judge should not do, for he "is not performing his function if he disappoints reasonable expectations created by earlier decisions."²⁶

But if change must be made and yet the change must not be made by nomos, then thesis is the only way to proceed.

In such situations it is desirable that the new rule should become known before it is enforced; and this can be effected only by promulgating a new rule which is to be applied only in the future. Where a real change in the law is required, the new law can properly fulfill the proper function of all law, namely that of guiding expectations, only if it becomes known before it is applied. 27

And this prospective change of the rules can be accomplished only by thesis. Thus, despite the problems associated therewith, the thesis process does serve a useful and even necessary function in Hayek's conception of law.

At this point it would be well to recall yet again that for thesis to produce law it must "have all of the attributes of a nomos". In other words, even in those situations in which the thesis process is to be preferred to the nomos process, the thesis must still be like nomos. But what does this entail, in what sense can a thesis "have all of the attributes of a nomos"?

To begin with the most obvious, the thesis must produce a rule of just conduct. That is to say, it must produce a general, purpose-independent rule. No matter how radical the change which is required may be, it must take the form of a general, purpose-independent rule.

Equally important, the rule which is produced must fit with the other rules which are already recognized and accepted in the society. As we have already seen when considering nomos, though a rule may in one sense be said to be novel, in another sense it must always be inherent in the existing system of rules.

The task of developing a system of law is thus an intellectual task of great difficulty which cannot be performed without taking certain rules as given and moving within the system determined by them. 28

Thus, like the judge the legislator must function as a discoverer and not a creator. Whatever the rules the legislator enacts through the thesis process, they must ultimately be anchored in the existing rules of the society. In sum, thesis will "have all of the attributes of a nomos" when it produces a general, purpose-independent rule which is "'implicit' in the body of the existing rules ...". 29

There is one final point to be considered about the relationship between nomos and thesis. For want of a better term we might refer to that point as the

hierarchical relationship between the two, for it concerns situations in which nomos and thesis might be said to be in conflict. There are two ways in which such situations might arise. One is when the legislature attempts to treat as a rule of just conduct what is in fact a rule of organization. The other is when the legislature and courts both articulate rules of just conduct, but the rules so articulated are not compatible. That is to say, the legislature and the courts are in disagreement as to the proper way to articulate a previously unarticulated rule. In both of these situations the crucial question is who has the final word.

The initial point to note about this question is that the answer itself is not a matter of legal theory. Legal theory can only tell us what the attributes are of something which will constitute law. But whether in a given situation those attributes are present is a matter of human judgement. Some individual or some group of individuals must make that judgement, for it cannot make itself. And who is to make that judgement is a matter of political theory.

How then does Hayek answer this question? In his model constitution he argues that a special court should be created to deal with situations in which there is question as to whether something is or is not law.³⁰ But this is only a proposal for a new and different structure. As things actually are, Hayek recognizes that it is the legislature which has the final say.

Any decision of the legislature which touches on matters regulated by the nomos will, at least for the case in hand, alter and supercede that law. As a governing body the legislature is not bound by any law, and what it says concerning particular matters has the same force as a general rule and will supercede any such existing rule.³¹

But, categorical as this statement is, there is still some

leeway. It is always possible for a court to attempt to construe a statute so as to avoid an apparent conflict with judge-made law. And, in some societies judicial review of certain legislative enactments is also possible. The fact remains, however, that under liberal political theory thesis generally has precedence over nomos.

The last of the three contrasting pairs of ideas which form the essence of Hayek's conception of law is law and morality. So far we have seen that an essential component of Hayek's conception of law is rules of just conduct. In fact, one might be tempted to conclude that law is rules of just conduct. But that would be an overbroad generalization, as Hayek himself makes clear:

We are not contending that all
rules of just conduct which are
in fact observed in a society
are law... .³²

Only some rules of just conduct are law, the rest are what we would call morality.

The question then is, how do you distinguish law from morality? The notion of enforcement seems to be the answer, for we find Hayek speaking of "law in the sense of enforced rules of conduct".³³ But when we consider what Hayek understands by enforcement the distinction seems to slip from our grasp.

Though most people would hesitate to give this name [i.e. law] to a rule of just conduct which, though usually obeyed, was in no way enforced, it seems difficult to deny it to rules which are enforced by a largely effective though unorganized social pressure, or the exclusion of the breaker of a rule from the group.
[Footnote omitted] ³⁴

This passage is rather troubling to say the least. It states quite clearly that unorganized social pressure constitutes sufficient enforcement to warrant treating

a rule of just conduct as law. The problem which this causes is that it is difficult to imagine how something could ever be called a rule of just conduct if it were not coupled with this broad notion of enforcement. Absent some pressure to conform, a rule of just conduct would not be a rule at all.³⁵ But, if all rules of just conduct are enforced, the distinction which seemed to exist between law and morality has become empty.

Fortunately, there is another passage in which Hayek draws a clear and unequivocal distinction between those rules of just conduct which constitute law and those which constitute morality.

[T]he difference between moral and legal rules ... is a distinction between rules to which the recognized procedure of enforcement by appointed authority ought to apply and those to which it should not, and therefore a distinction which would lose all meaning if all recognized rules of conduct, including all the rules which the community regards as moral rules were to be enforced.³⁶

Hence, the distinguishing factor between law and morality is whether the rules are enforced by an "organized authority".

What then are we to make of the earlier passage in which even rules of just conduct enforced by "unorganized social pressure" are considered to be law? I see two possibilities. The simplest, and therefore perhaps the best, is to treat the earlier passage as an aberration. Hayek cannot have meant what he said. The passage is merely an example of careless writing and thought. Admittedly, it is disturbing to come to such a conclusion. But being realistic, it is a rare book which has no inconsistencies in it.

There is, however, a way in which the earlier passage might be read so as to be not wholly incompatible

with the latter. This earlier passage has appended to it a footnote which refers to H.L.A. Hart's distinction between primary and secondary rules.³⁷ Hart, it will be recalled, argues that it is the addition of secondary rules, including secondary rules of enforcement -- i.e. organized enforcement --, to the primary rules of obligation which marks the transition from a pre-legal to a legal world. In the footnote Hayek grants that Hart's argument is of the "greatest importance" and yet rejects the conclusion: Hart draws.³⁸

It may just be that what Hayek is concerned about in the passage in question is to reject the idea that there can be a pre-legal society. And in fact, Hayek elsewhere makes just this point. "Law in the sense of enforced rules of conduct is undoubtedly coeval with society...".³⁹ Prior to the existence of an organized authority for enforcing rules of just conduct, there is no distinction between law and morality. But this is not to say that there is no law. There is both law and morality, or better law-morality, or even better yet there are simply rules of just conduct. The nascence of an organized authority for enforcement is of the "greatest importance" because it marks the separation of law and morality. But to say that rules of just conduct can now be separated into two types is not to maintain that the essence of either of those two types did not previously exist.

It must be stressed that this argument is entirely a reconstruction. There is no evidence to support it other than the passages and the footnote to which I have referred. What the argument is is an attempt to avoid the conclusion that the first passage cited is total nonsense. It is a matter of indifference to me whether the reader accepts this argument or simply chooses to disregard the passage in question. But the reader has to do one or the other,

for the later passage must be treated as definitive. The distinction between law and morality is a distinction between enforcement by an organized authority and enforcement by unorganized social pressure.

Granting that the distinction between law and morality depends upon enforcement by an organized authority, one might be tempted to question the need to make this distinction. That is, one might wonder why, once the organized authority is in existence, all rules of just conduct are not enforced thereby. Phrased this way the question may not seem to warrant serious consideration. The sheer number of rules of just conduct in any society would make it impractical to attempt formal enforcement of them all. But even were the scope of the question narrowed in such a way as to avoid the problem of practicality, there are still good reasons why only a limited range of rules of just conduct should be subject to formal enforcement.

Recall that Hayek's theory of law is an ideological theory and that the ideology upon which it rests is liberalism. Liberalism entails respect for individual liberty, and to that end it aims to keep at a minimum the coercion to which individuals are subjected. Now, while even enforcement by unorganized social pressure is coercive to an extent, it is generally not nearly as coercive as enforcement by an organized authority. Thus, liberalism aims to keep the latter type of coercion to a minimum. And for that reason it treats as law -- i.e. as subject to formal enforcement -- only those rules of just conduct which are absolutely necessary for the maintenance of a spontaneous order.

But which rules ought to be enforced and are therefore to be regarded as law is determined not only by specific designation of some rules as enforceable by authority, but often follows from the interdependence of some groups of rules where the observation of every one of them

is required for the achievement of what those already designated as enforceable serve: namely, the preservation of an ongoing overall order of actions.⁴⁰

Moreover, while a great many rules may be necessary for the maintenance of a spontaneous order, formal enforcement will be needed only for those which are not generally observed on a voluntary basis.

In some instances it would be necessary, for the smooth running of society to secure a similar uniformity [of observation] by coercion, if such conventions or rules were not observed often enough. Coercion, then, may sometimes be avoidable only because a high degree of conformity exists, which means that voluntary conformity may be a condition of a beneficial working of freedom.⁴¹

In addition to this ideological aversion to extending the scope of law and thereby of coercion, there is an additional reason why the number of rules of just conduct treated as law should be kept to a minimum. As a spontaneous order society functions and develops through a process of trial and error. And this process can succeed only if there is opportunity for individuals to experiment with ways of behaviour different from the norm.

There is an advantage in obedience to such rules not being coerced, not only because coercion as such is bad, but because it is, in fact, often desirable that rules should be observed only in most instances and that the individual should be able to transgress them when it seems to him worthwhile to incur the odium which this will cause. ... It is this flexibility of voluntary rules which in the field of morals makes gradual evolution and spontaneous growth possible, which allows further experience to lead the modifications and improvements ...

The existence of individuals and groups simultaneously observing partially different rules provides the opportunity for the selection of the more effective ones.⁴²

Thus, keeping to a minimum the rules of just conduct which are treated as law, and thereby subjected to enforcement by organized authority, is essential if a spontaneous order is to be allowed to continue to develop. In a short while we will consider from another angle the relationship between law and enforcement, that is when we consider the function of law in a liberal society.

However, before doing that I would first like to consider briefly two problems I see in the way Hayek distinguishes law from morality. The first is that I think Hayek is guilty of a reductionism similar to that of Hans Kelsen and others of the so-called school of Legal Positivism. In viewing law as rules of just conduct enforced by an organized authority, he sees all law on the model of criminal or tort law. Certainly it is meaningful to speak of that type of law as enforced by an organized authority. But what of most non-tortious, non-criminal law? What of the law of contract, the law of property, the law of estates and succession? These are not so much laws which are enforced, but rather (to borrow a term from H. L. A. Hart) laws which confer powers.⁴³

Only by taking a Kelsenian point of view and reducing such laws ultimately to a command to an official to apply a sanction when certain conditions are or are not fulfilled can we think of such laws as being enforced by an organized authority. But as Hart has argued, such a reductionist position grossly distorts the way law actually functions in society.⁴⁴ More than that, it is actually incompatible with Hayek's own thoughts on the difference between rules of just conduct and rules of organization.

A rule of conduct cannot be 'carried out' or 'executed' as one carries out an instruction. One can obey the former [i.e. a rule of organization] or enforce obedience to it; but a rule of conduct merely limits the range of permitted action and usually does not determine a particular action; and what it prescribes is never accomplished but remains a standing obligation on all.⁴⁵

Notwithstanding any of the foregoing, I think the essence of the distinction Hayek draws can be maintained, vis-a-vis both his own system and the Hartian argument against reductionism. The problem is not the essence of Hayek's distinction, but rather the terminology used to express it. I would suggest the following as a way around the problem. Law is distinguished from morality in that the scope and import of the rules of just conduct which constitute the former are determined by an organized authority. This terminology makes clear that the essence of the distinction between law and morality is the role of an organized authority, without confining that role to the limited concept of enforcement. For ease of discussion I will hereinafter continue to speak of law as those rules of just conduct which are enforced by organized authority. However, I do think the terminology I have suggested is preferable.

The other problem I see with the law-morality distinction arises in so-called 'gap' situations, that is in cases in which there is no rule of just conduct, articulated or unarticulated, specifically on point. In such cases the function of the judge is twofold. He is to articulate a rule which both resolves the problem at hand and at the same time is compatible with the system of rules which is already recognized to exist.

In this sense a rule not existing in any sense may yet appear to be 'implicit' in the body of the existing rules, not in the sense that it is logically derivable

from them, but in the sense that
if the other rules are to achieve
their aim, an additional rule is
required. 46

The problem I see is this. In attempting to fill such gaps the judge may obliterate the distinction between law and morality.

In seeking a rule which is implicit in the existing system of rules it would seem that the judge would have to, or at least be allowed to, consider both moral and legal rules. And, to the extent that the rule he articulates is informed by moral rules will it not itself be a moral rule: except, that is, that it will be enforced by the organized authority. What we seem to have is a bit of a circle. Only those rules which are enforced by organized authority are legal rules. But in 'gap' situations it is the organized authority which itself determines what rules will be enforced. In such situations it would appear that the distinction Hayek draws between law and morality may in fact break down. Of course, it may be that in 'gap' situations judges are to be concerned only with that system of rules which comprise enforced rules of just conduct. But if that is the case, Hayek has nowhere told us so.

And with that we complete our examination of the three pairs of ideas which are indispensable to an understanding of Hayek's conception of law. These three pairs -- rules of just conduct and rules of organization, nomos and thesis, and law and morality -- serve to delineate the parameters of Hayek's conception of law. But our examination of that conception is not yet complete, for while we have established its parameters, we have yet to consider its substance. That is to say, we have yet to consider the definitive function of law in a liberal society. It is to that task that the remainder of this chapter will be devoted.

C. The Function of Law

According to Hayek law has two related functions in a liberal society. One is to delineate and ensure a protected sphere within which the individual is free to act at his own discretion. The other is to delineate those areas in which the government may properly exercise coercion against the individual. It is thus that Hayek can speak of

those limits to the coercive powers of government which is one of the chief purposes of law (the other being protection against violence or coercion of people by their fellows).⁴⁷

Let us now consider each of these purposes in detail.

The notion of the protected sphere of responsibility has already been discussed in the chapter on rules of just conduct. Hence for our present purposes it will be sufficient to merely recap the highlights of that discussion. Three basic ideas are involved in the notion of a protected sphere of responsibility. The first and most obvious is to provide an area within which the individual is genuinely autonomous, an area within which the individual is free from coercion by other people.

The chief function of the rules of just conduct is thus to tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him.⁴⁸

Only if an individual has such a defined area within which he can act with reasonable security against outside interference can he be said to be at all free. And of course, Hayek's theory of law is a part of

an ideology which puts great value on individual freedom .

The second point to be noted about the protected sphere is that it is established primarily by negative rules. It is established not by telling an individual what he may do, but rather by telling him what his fellows may not do.

[Rules of just conduct] normally impose no positive duties on any one, unless he has incurred such duties by his own actions⁴⁹

Thus, negative duties (duties of forbearance) are the norm. Positive duties (duties of action) generally occur only because of some action by the duty-bearer (e.g. contractual relationships) or because of some existing relationship in which the duty-bearer stands (e.g. parent/child). And it is these primarily negative duties imposed on one's fellows (and one's self as well) which serve to delineate the individual's protected sphere of responsibility.

The final point to note about this protected sphere is that its essence is the harm principle. That is, the limits of this sphere are determined in accord with the principle of proscribing actions which harm others. "[O]nly such actions of individuals as affect other persons ... will give rise to legal rules."⁵⁰ Admittedly, there will at times be controversy whether the effects of a particular action are public or private. But that does not negate the value of the basic principle that an individual should be free to act as he chooses, so long only as his actions do not deleteriously affect others.⁵¹

When we turn to the relation between law and the limits of government coercion Hayek's position appears at first blush to be quite clear and quite simple. The government may coerce individuals only to enforce rules of just conduct. Thus, he frequently speaks of "the basic principle of limiting

all coercion to the enforcement of rules of just conduct."⁵² And, as we have just seen, the primary function of those rules of just conduct which constitute law is to prevent the coercion of the individual by his fellows. Hence, it follows that:

Within a spontaneous order the use of coercion can be justified only where this is necessary to secure the private domain of the individual against interference by others, but that coercion should not be used to interfere in that private sphere where this is not necessary to protect others.⁵³

To this point Hayek's position seems very similar to that of Robert Nozick.⁵⁴ The government should be limited in its coercive function to the role of a night watchman.

However, there are other passages in which Hayek appears to soften his position on government coercion. Consider, for instance, the following:

It is one of the axioms of the tradition of freedom that coercion of individuals is permissible only where it is necessary in the service of the general welfare or the public good.⁵⁵

But this seeming bow in the direction of the welfare state disappears upon closer inspection. Very shortly after the passage cited we are told that the general welfare is to be equated with "the securing of conditions in which the individuals and smaller groups will have favourable opportunities of mutually providing for their respective needs."⁵⁶ And so, the general welfare which is the justification for government coercion is really no more than the enforcement of the rules of just conduct.

Coercion can assist free men in the pursuit of their ends only by the enforcement of universal rules which do not direct them to particular ends, but by enabling them to

create a domain protected against unpredictable disturbance caused by other men -- including agents of government -- to pursue their own ends.⁵⁷

Having disposed of this seeming exception to Hayek's basic position on government coercion, we now come up against an exception which cannot be disposed of: taxation. The coercive taxation we are here concerned with is obviously not that needed to secure the enforcement of the rules of just conduct, for such taxation is merely a necessary means to a justified end. Rather, the taxation here is that needed to provide 'public goods'. Hayek clearly grants that government coercion may be utilized to collect taxes. In fact, he takes pains to disassociate himself from Nozick and the night watchman state.

Far from advocating such a 'minimal state' [Footnote to Nozick], we find it unquestionable that in an advanced society government ought to use its power of raising funds by taxation to provide a number of services which for various reasons cannot be provided, or cannot be provided adequately, by the market.⁵⁸

And this passage is no aberration, for the legitimacy of coercive taxation is recognized in The Constitution of Liberty⁵⁹ and The Mirage of Social Justice⁶⁰ as well.

Now, we have seen that the justification for the coercive enforcement of rules of just conduct is to provide a protected sphere of responsibility within which the individual is free from coercion by his fellows. But what is the justification for coercive taxation? Hayek sees it as essentially a process of give and take, a contribution to a common pool from which each gets something he wants.

The morality of this kind of coercion to positive action is, perhaps, not as obvious as the

morality of the rules which merely prevent the individual from infringing the protected domain of others. Particularly where the collective good in question is not wanted by all or at least by a considerable majority, this does raise serious problems. Yet it will clearly be in the interest of the different individuals to agree that the compulsory levying of means to be used also for purposes for which they do not care so long as others are similarly made to contribute to ends which they desire but others do not. ... So long as each may expect to get from this common pool services which are worth more to him than what he is made to contribute, it will be in his interest to submit to the coercion. 61

This defense is to my mind somewhat halfhearted. It seems to reduce the moral dilemma to one of simple expediency. Interestingly, Hayek himself recognized this in an earlier work.

[I]t is at least not obvious that coercing people to contribute to the achievement of ends in which they are not interested can be morally justified. Up to a point, most of us find it expedient, however, to make such contributions on the understanding that we will in turn profit from similar contributions of others toward the realization of our own ends. 62

What of those who are not willing to make such contributions, expedient or not? Wherein lies the justification for coercing their contribution? On this Hayek is silent.

However, notwithstanding any inadequacy in the justification for this type of coercion, the fact remains that Hayek does allow for coercive taxation. But this is the only exception which he recognizes to "the basic principles of limiting all coercion to the enforcement of rules of just conduct. 63 To sum up then, those rules of just conduct which constitute law

have a dual function. On the one hand they define a protected sphere within which the individual is secure from coercion by his fellows. On the other hand, they provide the only legitimate (save for taxation) occasion for the use of coercion against the individual by the government.

And with that we come to the end of our survey of Hayek's conception of law. It has probably been noticed, however, that we have of yet said nothing of a topic which appears quite closely related to law: i.e. justice. And it is to justice that we turn in the next chapter.

CHAPTER FIVE

JUSTICE

"Justice is, of course, not a question of the aims of an action but of its obedience to rules which it obeys." 1

Hayek's thoughts on justice are at the very best muddled, and it may even be that they are not altogether consistent. This is both surprising and disturbing in that the subject of justice is a major focus of Law, Legislation and Liberty. That being the case, one would expect a coherent and precise discussion. However, one will search in vain for any such a discussion.

To a large extent the difficulty experienced in trying to come to grips with Hayek's thoughts on justice results from the fact that he does not have a single idea of justice. Or better, he does not use the word "justice" to denote one single idea. Rather, there are two (or possibly three, see below) primary ways in which he uses the word "justice". These different uses are related, but not in the sense that any one can be said to be derived from another. However, while Hayek uses the word "justice" in several senses,

he never explicitly acknowledges the multiplicity of meanings he attaches to it. Instead, he continually slides from one use to another, glossing over, or perhaps oblivious to, the fact that he is using a single word to talk about different, albeit related, ideas. The confusion is exacerbated by the occasional use of the word "justice" in what might be termed a layman's sense, i.e. some amorphous notion of fairness. The result of all this is, as I have already noted, a rather muddled discussion of justice.

My intent in this chapter is to bring some coherence to that muddled discussion, to present an explication of Hayek's thoughts on justice which is clearer than the explication he himself presents. To this end, I have divided this chapter into three sections: The Nature of Justice, The Subject Matter of Justice, and Exegetical Criticism. No great store should be attached to the titles of these sections, for no clear-cut distinction is possible between any of the three. The sections are simply intended to impose some order on the discussion. If the reader finds fault with the way I have approached the topic, I hope that he will keep in mind that it is not easy to discuss coherently something which is itself incoherent.

A. The Nature of Justice

The element which is common to the different ways in which Hayek uses the word "justice" is the notion of rules.

To speak of justice always implies that some person or persons ought, or ought not, to have performed some action; and this "ought" in turn presupposes the recognition

of rules which define a set of circumstances wherein a certain kind of conduct is prohibited or required. 2

When we speak of justice we speak of rules. Absent some reference to rules, there can be no discussion of justice. The question then is how does justice relate to rules. The following are the ways in which that relation can be said to exist.

- 1) justice is the principle of applying the same rules to all.
- 2) justice is the principle of applying those rules which are part of the system of rules which constitute a society; in those situations in which there is no existing applicable rule, the rule to be formulated must fit with the existing system of rules.
- 3) justice is the principle of applying only rules of just conduct

The first sense of justice which I have identified finds expression in one of the most clear and concise statements Hayek makes about justice. Thus, he speaks of "[t]he conception of justice as we understand it, that is, the principle of treating all under the same rules".³ In considering this sense it is well to recall the broad manner in which Hayek uses the word rule. He does not mean thereby a formally articulated norm, but "simply a propensity to act or not act in a certain manner, which will manifest itself in what we call a practice or custom."⁴ Hence, when Hayek asserts a necessary connection between justice and rules he means only that justice presupposes some established pattern of behavior:

We know by now that the 'existence' of a recognized rule does not in this context necessarily mean that the rule has been stated in words. It requires only that a rule can be found which distinguishes between different kinds of conduct on lines which people in fact recognize as just or unjust. 5

The idea of justice as the principle of applying the same rules to all is very similar to what might be called legal justice. It is similar to what we have in mind when we say that a judge must do justice to the parties before him. He can be no respecter of particular persons, but must apply to both parties the applicable rule or rules. This legalistic emphasis in Hayek's thoughts on justice is something to which we will return in the last section of this chapter.

Another way to approach this sense of justice is by means of the concept of universalizability. To universalize a rule of conduct means to apply that rule to each and every situation which meets the conditions specified in the rule. Hence, a rule which provides "all X's shall do Y" means precisely that. If any X is not required to do Y, then the rule has not been universalized, unless that particular X falls within some exception to the rule. And in that event the rule would more properly be formulated as "all X's, except those meeting criterion A, shall do Y". And then the rule has, in fact, been complied with. Hayek's first sense of justice is, in effect, nothing more than the requirement that rules of conduct be universalized.

All ultimate power should, in other words, be subject to the test of justice, and be free to do what it desires only in so far as it is prepared to commit itself to a principle that is to be applied in all similar instances.⁶

The relationship between the second sense in which Hayek speaks of justice and the first is patent. While the first requires that whatever rules are to be applied be applied equally to all, the second is concerned with the identity of the rules which are to be applied. The key here is that justice is concerned not with a variety of individual rules standing in isolation one from another. Rather, it is concerned with a system of rules, a system which is living and

thus growing. Hence, in determining what rule is to be applied in a given situation, the decision is not made within a vacuum, but within a given context.

The task of developing a system of law is thus an intellectual task of great difficulty which cannot be performed without taking certain rules as given and moving within the system determined by them. 7

Because the decision which rule to apply occurs within the confines of an existing system of rules, the decision making process is a matter of reason and not will. Thus, the mere fact that it is desired that something be just is not enough. Only if a rule can be rationally drawn from the existing system of rules can it be said to be a rule of justice.

Indeed it would seem that as little as we can believe what we will, or hold to be true what we will, can we regard as just what we will. Though our desire that something should be regarded as just may long overrule our reason, there are necessities of thought against which such desire is powerless. While I may possibly convince myself by spurious reasoning that something I would wish to be just was really just, whether it is so clearly is not a matter of will but of reason. It will not merely be the contrary view of others which will prevent me from regarding as just what is in fact not so, nor some strong sentiment which the particular question at issue arouses in me, but the necessity of consistency without which thought would become impossible. This will drive me to test my belief in the justice of the particular act by the compatibility of the rule by which I judge it with all the other rules in which I also believe. 8

And, as we have already seen in a previous chapter when discussing nomos, the primacy of reason over will holds even when situations arise in which there is no pre-existing rule. In such situations the

rule which is articulated must be compatible with the existing system of rules.

In this sense a rule not existing in any sense may yet appear to be 'implicit' in the body of the existing rules, not in the sense that it is logically derivable from them, but in the sense that if the other rules are to achieve their aim, an additional rule is required. 9

According to Hayek it is justice which requires that the rules which are to be applied equally to all be identified and formulated in this way. Failure to proceed in this way, even if inadvertent, results in a rule which is unjust. The rule is unjust not in its content but rather in that by failing to be compatible with the existing system of rules it is inappropriate for application in the first sense of justice.

What we really mean when we say, e.g. that a rule which we all thought to be just proves to be unjust when applied to a particular case, is that it is a wrong rule which does not adequately define what we regard as just, or that the verbal formulation of the rule does not adequately express the rule which guides our judgement. 10

The final sense in which Hayek uses the word justice needs little elaboration. The system of rules which are to be developed in the second sense of justice and applied equally to all in the first sense are the rules of just conduct. And the rules of just conduct, as we have already seen, are the general, purpose-independent rules, spontaneous in origin, which form the framework which constitutes a society. In this third sense in which Hayek uses the word, to speak of justice is to speak of rules of just conduct.

Only those aspects of the order of human actions which can be determined by rules of just conduct do therefore raise problems of justice. 11

Now in fact this third sense of justice may be a part of the second sense. The argument for this interpretation would be that, given Hayek's contention that society is a spontaneous order or cosmos, the rules which constitute it must of necessity be rules of just conduct. On the other hand, because Hayek's discussion is confined exclusively to spontaneous orders, there is no ready way to tell whether the rules of justice are necessarily or contingently rules of just conduct. Certainly in a directed society (a taxis), which utilized primarily rules of organization, the first two meanings of justice would still make some sense. It is for that reason that I have chosen to list the third sense of justice as a distinct sense. Having belaboured this point, I must add that the distinction is not terribly important for our purposes since Hayek is concerned solely with spontaneous orders and therefore justice will involve rules of just conduct.

Before moving on to consider other facets of Hayek's conception of justice there is one additional issue relating to these three senses of justice which should be considered. And that issue is the question of who it is to which each of these senses of justice is directed.

The first sense of justice, the obligation to apply the same rules to all, seems to be equally directed to both individuals and to authorities. As to the latter, we have already seen how applying the same rules to all suggests the judicial obligation of fairness, to disregard persons and to apply the pertinent rule wherever and whenever it applies. As to individuals, this sense of justice suggests Kant's first formulation of the Categorical Imperative: "act only on that maxim through which you can at the same time will that it should become a universal law."¹² Of course Hayek does not intend that the individual utilize this principle to

establish the rules of conduct. But by requiring that a rule be applied to all, there is a tacit requirement that it be a rule such that it can be applied to all. In any event, even if one disputes any similarity to the Categorical Imperative, it does seem beyond dispute that this sense of justice is one which is applicable to individuals as well as to authorities.

Not so with the second sense of justice: applying rules which are part of a mutually consistent system of rules. This sense clearly seems to presuppose some authority which is doing the applying. And, in fact, any discussion of this sense of justice almost always occurs in the context of the judicial authorities engaging in the nomos process. It is the judges (or other legal authorities) who decide which rule is to be applied to a dispute before them. It is the judges who decide which of the existing rules is appropriate, or if need be what new rule will be compatible with the existing system. Thus, this sense of justice would appear to be directed solely, or at least primarily, to authorities. Any pertinence to individuals is not apparent on its face.

The third sense of justice, the requirement that the rules of justice be the rules of just conduct, would appear to be directed equally to individuals and to authorities. To the extent this sense is viewed as a subordinate part of the second sense its concern would seem to be limited to the authorities, for it is the authorities who must articulate and develop the rules of just conduct. However, as to those rules of just conduct which have been articulated and are commonly known, these could be drawn in by the first sense of justice which requires that the same rules be applied to all. And to this extent the third sense of justice would be directed at both individuals and authorities.

One absolutely essential point to note about all three of the senses in which Hayek uses the word justice is that the real emphasis is on injustice, not justice. It is injustice which wears the trousers. This follows from the fact that the test for justice in each of the three senses is negative. Thus, in the first sense what we must determine is whether the same rule has been applied to all. In the second sense we must determine whether the rule to be applied exists as part of, or is compatible with, an existing system of rules. And in the third sense our concern is with whether the rule to be applied is a rule of just conduct. A negative answer in any of these senses indicates the presence of injustice. Similarly, a positive answer indicates that there is no injustice. Of course, to a certain extent the absence of injustice will indicate the presence of justice. But the fact remains that what we have found in each case is not the positive presence of some element, but rather the absence of an element.

Moreover, while we can always be certain when we have found injustice, e.g. in that the rule to be applied is incompatible with the existing system of rules, we cannot be so certain that we have found justice. Thus, reconsideration of a rule previously applied may, in light of subsequent developments, indicate that the rule was not, in fact, compatible with the existing system of rules. Hayek himself compares this emphasis on injustice with Karl Popper's test of scientific truth.

The positions in the two fields are analogous also in that we can always only endeavour to approach truth, or justice, by persistently eliminating the false or unjust, but can never be sure that we have achieved final truth or justice. ¹³

Another sense in which injustice rather than justice is the primary concept stems from the fact that we are operating within a given system of rules.

It is not justice which determines which rules shall be applicable. Rather, it is injustice which determines which rules cannot be applicable. The rules are already there, our task is only to determine whether we are in compliance with them. It is interesting to note in this vein that Hayek sees considerable similarity between his own essentially negative test of justice and Kant's Categorical Imperative, at least as far as the latter is applied to law as distinct from morality.

So far as his philosophy of law is concerned, Kant was fully aware that the categorical imperative provided only a necessary but not a sufficient condition of justice, or only what we have called a negative test which enables us progressively to eliminate what is unjust, namely the test of universalizability.¹⁴

Again, I do not mean to overstress any putative relation between Hayek and Kant, for it is certainly not my intent to be drawn into the fields of Kantian scholarship. But, at the very least, the foregoing quotation does make quite clear that in Hayek's own mind it is the negative test, the test of injustice, which is of primary importance.

It is useful to keep in mind this stress on the negative element when we come to consider the status which Hayek accords to justice. Probably the most commonly assigned status for justice is as a virtue. Though the precise nature of a virtue is a matter of considerable debate, there can be no real doubt as to the essence of what is meant when someone describes justice as a virtue. So, rather than risk a debate on an issue wholly extraneous to the subject matter of this chapter, I will not offer any definition of virtue. Instead, I will simply take for granted that the reader understands in general terms what is meant when justice is described as a virtue. As I say, the point is not terribly important here, for Hayek does not treat justice as a virtue.

Nor does he treat it as some sort of determinate ideal end-state, realizable in theory if not in practice. No, for Hayek the appropriate status of justice is as a value. To speak of a value is to evince an interest in a certain state of affairs. And a state of affairs denotes, not some end-state which it is possible to realize in its entirety, but rather something more indeterminate, something which can never be said to be fully achieved. Whereas we can achieve an end-state, we can only instantiate a state of affairs.

To better grasp this, consider the way John Finnis defines value: "a general form of good that can be participated in or realized in indefinitely many ways on indefinitely many occasions".¹⁵ Or better yet, consider Hayek's own definition of value:

[W]hich term we shall understand to refer to generic classes of events, defined by certain attributes and generally regarded as desirable. By 'desirable' in this connection we thus mean more than a particular action is in fact desired by somebody on a particular occasion; it is used to describe a lasting attitude of one or more persons to a kind of event.¹⁶

Surely this definition fits to a T the various senses in which Hayek speaks of justice. Justice is a lasting attitude of one or more persons to a kind of event, viz. compliance with the negative test of justice. And, as we have just seen, this negative test cannot lead us once and for all to a determinate goal. It can only point us continuously in the direction of an ideal towards which we can strive, but can never hope to achieve. As Hayek says, "we can hope to approach justice without ever finally realizing it."¹⁷

Taken together the emphasis on the negative aspect and the status of justice as a value yield what is one of the most significant claims which Hayek

makes about his conception of justice. It is an objective standard of judgement for any given society. The claim to have presented an objective conception of justice immediately suggests an affinity with Natural Law theory. But no such affinity is present. Hayek does not see himself as a Natural Lawyer, nor does he see himself as a Legal Positivist. Rather he sees himself as offering a third alternative. It is thus that he can say of his theory:

It does not stand in any sense between legal positivism and most natural law theories, but differs from either in a dimension different from that in which they differ from each other. 18

His theory stands distinct from the other two alternatives in that it offers an historical or evolutionary explanation for the origin and development of the rules of conduct upon which it relies. This aspect we have already examined in detail in previous chapters.

In defending his claim to have set forth an objective standard of justice, Hayek sets his defenses almost entirely against the views of the legal positivists, and those of Hans Kelsen in particular. He sees the essence of their position on justice to be the following:

that justice can in no sense be a determinant of what is in fact law but that it is rather the law which determines what is just. ... [T]he contention that the lawgiver was the creator of justice became the most characteristic tenet of legal positivism. 19

The error of the positivists was, however, to concern themselves solely with seeking a positive conception of justice.

Hayek is quite willing to grant that they have succeeded "in demonstrating that there are no positive criteria of justice".²⁰ But a positive criterion is not the only possibility if we are seeking

an objective standard.

The positivist conclusion was, however, reached only through the tacit but erroneous assumption that objective criteria of justice must be positive criteria, i.e. premises from which the whole system of rules could be logically deduced. But if we do not insist that the test of justice must enable us to build up a whole system of new rules of just conduct, but are content persistently to apply the negative test of injustice to the parts of an inherited system, the greater part of whose rules are universally accepted, we may accept the contention of positivism that there are no positive criteria of justice; yet we can still maintain that the further development of the rules of just conduct is not a matter of arbitrary will but of inner necessity, and that solutions to open problems of justice are discovered, not arbitrarily decreed. The fact that there are no positive criteria of justice does not leave unfettered will as the only alternative. We may still be bound by justice to develop the existing system in a particular way, and be able to demonstrate that we must alter particular rules in a certain way to eliminate injustice. 21

Thus, by identifying and eliminating what is unjust we move continually towards the ideal of justice. And this ideal, while it does not allow us to construct from scratch a system of rules, does dictate the decisions we must make, given the system of rules within which we are operating. Inasmuch as such an ideal is a matter of reason and not will, it can fairly be described as objective.

In such an effort towards the development of a body of rules, most of which are accepted by the members of society, there will also exist an 'objective' (in the sense of being inter-personally valid, but not universal -- because it will be

valid only for those other members of the society who accept most of its other rules) test of what is unjust.²²

There is one qualification of a sort which should be noted about this objective standard of justice. In that it is a negative standard, there is no certainty that there will be but a single correct route in which the rules of the system should develop. Remember, the standard will only tell us what may not be done. But to recognize this does not detract from the fact that the standard does provide an objective test of what may not be done.

It is thus at least conceivable that several different systems of rules of just conduct may satisfy this test. The fact that there exist different ideas of what is just does not preclude the possibility that the negative test of injustice may be an objective test which several different but not all systems of such rules can satisfy.²³

One point remains to be made before leaving this topic. In theory Hayek's conception of justice does provide an objective standard for judging the rules of a system. However, in practice there is a real question as to just how objective this standard is. It is one thing to say that the system provides the standard against which a rule which it is proposed to apply must be judged. But it must be kept in mind that this standard will not apply itself. One or more persons will have to determine whether the proposed rule is or is not compatible with the existing system of rules. And this determination cannot help but have a certain amount of discretion involved in its making. The crucial question is how much discretion is involved. The wider the discretion, the less objective the standard becomes. The wider the discretion, the more subjective the standard becomes, the more the standard becomes identified

with the personal judgement (opinion, belief, prejudice) of the decision maker. What all this comes down to is that what is needed before Hayek's standard of justice can be deemed objective in practice is a theory, at least in outline, of legal reasoning. But this is something which is explicitly lacking in Hayek's work. We will recur to this problem again in a later chapter.

By now the reader may very well have drawn a conclusion about Hayek's conception of justice which seems begging to be drawn. That is, Hayek's conception of justice emphasizes form to the virtual exclusion of substance. Consider again the three primary ways in which a judgement of injustice can be made. First, it is unjust if the same rule is not applied to all. Second, it is unjust if the rule applied is not a part of or implicit in the existing system of rules. Finally, it is unjust if the rule applied is not a rule of just conduct. Not one of these judgements has anything to do with the actual content of the rule to be applied. In fact, it would be difficult to say that these judgements have anything to do with the form of the rules either. The fact is, the rules are already expressly or at least implicitly existing. The judgements are purely formalistic, dealing with the way the appropriate rule is to be identified and with its universalization.

Given all this, it seems hard to resist the conclusion that Hayek's conception of justice is totally divorced from any concern with the way people actually behave. So long as a rule exists in a society, be that rule what it may, justice requires that it be complied with and enforced. To a certain extent I am afraid that such a conclusion is warranted. And such a conclusion seems intuitively most unpalatable. But before thinking the worst, before characterizing Hayek as some kind of immoralist, let us reconsider the position. There may be something to be said in his defense after all.

To this end it might help to recall that a similar charge has been levied against Lon Fuller and his theory of the inner morality of law. The charge there is that by concentrating on the inner morality of law -- i.e. certain procedural requirements which must be met for something to be properly designated as law -- Fuller is totally indifferent to the external morality of law -- i.e. the substance of law. In short order Fuller's reply to that charge is as follows:

In presenting my analysis of the law's internal morality I have insisted that it is, over a wide range of issues, indifferent towards the substantive aims of law and is ready to serve a variety of such aims with equal efficacy. ... But a recognition that the internal morality of law may support and give efficacy to a wide variety of substantive aims should not mislead us into believing that any substantive aim may be adopted without compromise of legality. 24

Hayek would, I believe, respond similarly to the charge that he is indifferent to the substance of the rules of justice. And there would be some merit to such a response.

To begin, the requirement of universalizability, the principle of applying the same rules to all, puts a substantial check on the application of rules the substance of which might commonly be considered 'unjust'. Certainly rules of a particularly egregious nature are not apt to be applied, not if they will be equally applicable to the person applying the rule.

Then too, it must be recalled that there are a number of limitations, albeit formal ones, which affect the substance of rules of just conduct. And, in a spontaneous order, which is all that Hayek is really concerned with, the rules of justice are of necessity rules of just conduct. I will not here repeat the detailed discussion of rules of just conduct found in an earlier chapter, but will instead merely

highlight the factors which appear relevant. Rules of just conduct are abstract, that is, their concern is with establishing patterns of behaviour, and they are intended to apply to an unknown number of future indeterminate instances. They are also purpose-independent, aiming at an order which allows the maximal opportunity for individuals to pursue their own aims. And, they are general; the classifications they draw should be as broad as possible rather than being so narrow as to allow ready identification of the people to be affected by the rule.

Taken together, these factors will impose some limit on the content which the rules of justice may have. This is not to claim that they will by any means totally control the content of the rules. Nor will they even control that content to the extent that the theories of writers such as Rawls, Galston, and Ackerman do.²⁵ The theories of such writers identify specific substantive areas (including a realm of social justice) with which justice must be concerned. Clearly Hayek's theory identifies no such areas. Nevertheless, the fact is that Hayek's theory does impose some control over the content of the rules of justice, and any control at all is more than one is initially likely to believe present. And, to those who claim that this is not enough, I suspect that Hayek would reply that we must not confuse justice with the whole of morality. Other aspects of morality may very well determine how we are to interact with our fellows. Well and good. But justice is a determinate concept, and one cannot ask it to do more than is appropriate to it.

Another criticism which is likely to be leveled at Hayek's conception of justice is related to the one with which we have just dealt. That is, that the thrust of the conception is predominantly, if not exclusively, conservative. To repeat for the umpteenth time, justice works within a system of

pre-existing rules. Its function, if one can so speak, is to maintain and facilitate the working of that system of rules. Justice is, if you will, the preserver of the status quo. Even when correction of the system is required, such correction always takes place within the existing structure of the overall system of rules. This process, it will be recalled, Hayek designates as immanent criticism.

We shall call 'immanent criticism' this sort of criticism that moves within a given system of rules and judges particular rules in terms of their consistency or compatibility with all other recognized rules in inducing the formation of a certain kind of order of actions.²⁶

Now compare this conservative idea of justice with what D. D. Raphael calls prosthetic justice. "Prosthetic justice adds further rights, rights to benefits which were not formerly counted due as a matter of right."²⁷ It would appear that there is no place for such ideas within Hayek's conception of justice. As we have already seen, justice cannot create something which is not there; it can only lead us to discover what is already there.

This criticism, like the previous one, I think too blunt and too indiscriminate. It would be wholly accurate if, and only if, the system of rules with which we were concerned were altogether internally consistent. Yes, in such a case there would be no changes to be made, no new rights to be added. But what are the chances that there is, ever has been, or ever will be a system of rules which is altogether internally consistent? Moreover, there will always be the need to adapt the rules to changing circumstances.

Once we grant that there are internal flaws in a system of rules, then there is room for Hayek's conception of justice to work. By applying the three tests of justice, by utilizing the process of immanent criticism, new rights will in a sense be created.

Such rights will not be altogether new, for they will of necessity have been implicit in the system. They will have been existing rights; but they will have existed only in theory, not in practice. It is the application of the requirements of justice which will bring such rights into practice. One need not look far to find examples of such "newly" created rights.

There can be no doubt that in such fields as the law on the relations between master and servant, [Footnote omitted] landlord and tenant, creditor and debtor, and in modern times between organized business and its customers, the rules have been shaped largely by the views of one of the parties and their particular interests -- especially where, as used to be true in the first two of the instances given, it was one of the groups concerned which almost exclusively supplied the judges. 28

In such circumstances justice functions conservatively in that its concern is to maintain an existing system of rules. But it also functions prosthetically in that it brings to life rights which, though implicit in the system, had not heretofore been recognized in practice.

Of course, a conception of justice which confines itself to the maintenance of an existing system of rules by means of immanent criticism cannot be as activist as a conception which purports to stand outside the system of rules which it judges. But then again, one must wonder if there can be a conception of justice which stands wholly outside the system of social rules which it purports to judge. It is a trite observation, made in many contexts, that the critic must always stand somewhere. And, given the broad meaning which Hayek assigns to the notion of rules, it is difficult to conceive how the critic of a society could ever stand altogether outside the rules of that society. Will not he always be embarked upon immanent criticism, criticizing

part of the system in terms of other parts. Only one such as the eskimo who criticizes a contemporary western society will be truly outwith the system of rules which he criticizes. And surely it is not such a situation which Raphael has in mind when he contrasts prosthetic with conservative justice.

Yes, Hayek's conception of justice is conservative, if by conservative is meant the maintenance and facilitation of an existing system of rules. But if by conservative is meant reactionary, then his conception of justice is most certainly not conservative. It is instead prosthetic in that it adds "rights to benefits which were not formerly counted due as a matter of right."

There remains one final point to be made about the nature of Hayek's conception of justice, and that has to do with the very basis of this conception. What is it that is necessary for this conception of justice to exist and function? Recall yet again that justice presupposes a pre-existing system of rules. Recall also that Hayek's notion of a rule is broad enough to encompass not only rules in the ordinary sense but also what we would be more apt to call principles as distinct from rules. These rules are spontaneous in origin, and initially are abstract, unarticulated norms of behaviour. The search for justice goes hand in hand with the articulation of these heretofore unarticulated rules. But this process of articulation can succeed only to the extent that it remains faithful to the underlying unarticulated norms.

No group is likely to agree on articulated rules unless its members already hold opinions that coincide in some degree. Such coincidence of opinion will thus have to precede explicit agreement on articulated rules of just conduct 29

It is this underlying agreement which is the key to Hayek's conception of justice. Justice cannot play off against a system of rules unless there is in fact agreement as to the essence of that system.

Our whole conception of justice rests on the belief that different views about particulars are capable of being settled by the discovery of rules that, once they are stated, command general assent. If it were not for the fact that we often can discover that we do agree on general principles which are applicable, even though we at first disagree on the merits of the particular case, the very idea of justice would lose its meaning.³⁰

Thus, for Hayek justice presupposes a deep-seated, underlying agreement on basic values. Absent such agreement, it is meaningless to speak of justice.

There are two closely related difficulties raised by this position. The first is, exactly what constitutes agreement? Is it actual agreement, such that when confronted with principle X the average citizen would say, "oh yes, I hold that principle." Or, is it more of a tacit agreement, such that it may have to be demonstrated dialogically to the average citizen that, know it or not, he does hold the principle in question. If the agreement required is to the latter alternative, then the way is open for some elite to tell the rest of us what it is which we really believe. Much of the criticism of the U. S. Supreme Court under Chief Justice Warren was that it was acting in this manner. If, on the other hand, the agreement required is actual agreement, we may find, at least in societies such as the United Kingdom and the United States, that Hayek is overly sanguine about the extent of the agreement on basic values.

And that leads into the second difficulty which is precisely how much agreement is necessary to constitute agreement. Assuming, as seems

eminently reasonable, that unanimity is out of the question, what portion of the population of a society must agree on basic values in order for there to be agreement on those values? Moreover, when the point is reached at which it must be admitted that there is no agreement, what then? Does justice really go out of the window as Hayek maintains. I do not intend to attempt to answer these questions here. For now I pose them only to show that there are difficulties in maintaining that justice has meaning only where there is agreement on basic values. In a later chapter I intend to return to these issues, with especial reference to the way they affect Hayek's critique of social justice.

To conclude this section, I can think of no better way than to quote at length what is probably the most detailed and comprehensive statement Hayek gives of his conception of justice.

The essential points of this conception of justice are (a) that justice can be meaningfully attributed only to human action and not to any state of affairs as such, without reference to the question whether it has been, or could have been, deliberately brought about by somebody; (b) that the rules of justice have essentially the nature of prohibitions, or, in other words, that injustice is really the primary concept and the aim of rules of just conduct is to prevent unjust action; (c) that the injustice to be prevented is the infringement of the protected domain of one's fellow men, a domain which is to be ascertained by means of these rules of justice; and (d) that these rules of just conduct which are themselves negative can be developed by consistently applying to whatever such rules a society has inherited the equally negative test of universal applicability -- a test which in the last resort, is nothing else than the self-consistency of the actions which these rules allow if applied to the circumstances of the real world. 31

B. The Subject Matter of Justice

Of the points which we have just seen Hayek to consider essential to his conception of justice, the first is one about which we have so far said nothing:

that justice can be meaningfully attributed only to human action and not to any state of affairs as such, without reference to the question whether it has been, or could have been, deliberately brought about by somebody. 32

This section will deal with that aspect.

A threshold question to be considered is how this aspect of justice relates to the three senses of justice which we discussed in the preceding section. To be honest, it does not seem to me that there is a terribly close relationship between this aspect of justice and the three senses of justice. These two facets appear to represent quite different concerns of Hayek, which he never expressly bothers to tie together other than by denoting both as justice. Nevertheless, in an attempt to present a unified theory of justice, I would suggest that the following is a way in which these two facets can be connected.

The three senses of justice, taken together, deal with the identification and application of an existing system of rules. The requirement that justice apply only to human action provides a sort of generic limitation upon the rules of that system. I say generic, because the limitation is totally divorced from the content of those rules. It is concerned solely with the basic subject matter of those rules, saying nothing about how that subject matter is to be treated. What then is the nature of that generic limitation?

To go right to the heart of the matter, Hayek maintains that justice is concerned with human conduct alone. "Strictly speaking, only human conduct can be called just or unjust."³³ At first glance this position seems neither controversial, nor terribly informative. It seems patently obvious that only human beings can act justly or unjustly. Just conduct has no meaning when we speak of animals, vegetables, or minerals. However, the difficulty with this approach is that it confuses two distinct ideas. To say that only human beings can act justly or unjustly is not the same as to say that only human conduct can be called just or unjust. The latter is a broader claim, and it is one which is disputable.

To see this we need only to consider some alternative positions which have been posited. For instance, David Miller maintains that the primary use of justice is in the sense of "just states of affairs".³⁴ John Rawls maintains that "justice is the first virtue of social institutions ...".³⁵ And Lars Ericsson maintains that it is proper to speak of justice "as it applies to the patterns of distributions of values and disvalues that constitute the distributive effects of social cooperation and social conflicts of interest."³⁶ Taken at face value, each of these propositions attributes justice to something other than human conduct.

Now, in order to better grasp the sense in which Hayek's position is distinct from views such as the above, let us take a closer look at the difference between Hayek and Miller. Perhaps it might be argued that Hayek has overstated his case in maintaining that only human conduct can be called just or unjust. If presented with a position such as Miller's he might readily admit that it was compatible with what he understands by justice. But any such supposition can be readily quashed.

Justice is thus emphatically not a balancing of particular interest at stake in a concrete case, or even of the interests of determinable classes of person, nor does it aim at bringing about a particular state of affairs which is regarded as just. 37

No, there can be no doubt that Hayek rejects Miller's views on the appropriate subject matter of justice.

But what is it about attributing justice to states of affairs which Hayek finds so objectionable? What is the difference between calling a particular instance of human conduct unjust and calling the state of affairs which that conduct produces unjust? In fact, there does not appear to be any. So wherein lies the problem?

Consider, while all human conduct will produce some state of affairs, not all states of affairs are produced by human conduct. A great many states of affairs come about wholly independently of any human conduct; they simply happen. Whether we say that nature, chance, God, or something else has brought them about, the fact remains that it is not human conduct which has done so. Hayek is quite willing to call some states of affairs just. But when he does so what he is really talking about is the underlying human conduct.

If we apply the terms [just or unjust] to a state of affairs, they have meaning only in so far as we hold someone responsible for bringing it about or allowing it to come about. A bare fact or a state of affairs which nobody can change, may be good or bad, but not just or unjust. [Footnote omitted] To apply the term 'just' to circumstances other than human actions or the rules governing them is a category mistake. 38

What Hayek objects to is the attribution of justice to states of affairs which have not been produced by human conduct. Thus, the above quotation continues:

Only if we mean to blame a personal creator does it make sense to describe it as unjust that somebody has been born with a physical defect, or been stricken with a disease, or has suffered the loss of a loved one. Nature can be neither just nor unjust. 39

Miller, on the other hand, is prepared to treat a broader range of states of affairs as appropriate for judgements of justice. Nonetheless, even his position has limits. And, to see precisely where he differs from Hayek it is necessary to quote him at length.

Not every state of affairs can properly be described as just or unjust. It must; first of all, involve sentient beings, and paradigmatically it involves beings who are both sentient and rational. ... It must also be a state of affairs in which at least one of the sentient beings is enjoying a benefit or suffering a burden; if no one is affected in either of these ways, questions of justice cannot arise. It must, thirdly, be a state of affairs which has resulted from the actions of sentient beings, or is at least capable of being changed by such actions. [emphasis added] 40

The underscored passage is crucial. In rejecting states of affairs as an appropriate subject for justice, Hayek is rejecting the claim that any situation which can be affected by human beings may properly be judged just or unjust. For Hayek only situations which human beings have brought about can be judged to be just or unjust. It is for that reason that, referring specifically to Miller, he can say:

The younger generation of social philosophers apparently do not even know what the basic concepts once meant. Only thus can it be explained when we find a young scholar seriously asserting that the usage of speaking of a 'just state of affairs ... must be regarded as the primary one ...'

[Footnote omitted] ... As we have seen a state of affairs which has not been deliberately brought about by men can possess neither intelligence nor virtue, nor justice, nor any other attribute of human values 41

This stance certainly puts Hayek in the minority of contemporary social theorists. Miller is not alone in wishing to treat any situation which human beings can affect as a proper subject matter for justice. In fact, his position is even mild in comparison to some. Bruce Ackerman seeks to include even genetic endowment in the subject matter of justice.⁴² (Ackerman's views are so extreme that one wonders at times why he chose to omit the weather from his consideration.) Be that as it may, Hayek has staked out a position which puts him at odds with many of his contemporaries in the field of social philosophy.

There is, however one difficulty with his position: it may rest upon a distinction without a difference. To wit, if human beings can change a situation and elect not to, can they not then be said to be responsible for the continued existence of that situation? If so, then we would have the human conduct which Hayek requires for a judgement of justice. To answer that question we have to know what it is that Hayek understands by human conduct. And to that subject I now turn.

Let us begin with a point so obvious that I do not believe Hayek ever mentions it. Only volitional human action can be considered just or unjust. Clearly conduct which results from some force over which the person has no control -- such as an epileptic fit or a post-hypnotic suggestion -- can be neither just nor unjust. Similarly, a person who is bodily used as an instrument by another -- e.g. deliberately pushed into a third party -- acts neither justly nor unjustly.

Likewise, a person who is coerced into acting does not act volitionally, and hence cannot fairly be judged to have acted justly or unjustly. Of course, there are some problems here. Namely, what constitutes coercion in a given situation, and whether coercion can ever be said to justify certain extreme actions, such as taking innocent human life. But these questions are beyond the scope of this study, involving as they do a detailed analysis of the philosophy of action. For our purposes it is enough to say that the idea of human conduct presupposes volitional action, recognizing that at times what is volitional may be a moot point.

There is one further point to add here, though. A strict determinist, or a behaviourist such as B. F. Skinner, might deny that there is ever such a thing as genuinely volitional action. And that would nullify the distinction just drawn between actions which constitute human conduct and those which do not. As it turns out, however, there is absolutely nothing in Hayek's writings to even faintly suggest that he holds such a position. Quite the contrary, the notions of free will and responsibility play major roles in his entire social philosophy.

Another quite obvious point which can be dispensed with rather quickly is that the human conduct with which justice is concerned must be conduct which affects other human beings. Technically, this is not a requirement of human conduct, for patently human conduct can affect no one but the actor himself. But inasmuch as our present concern is the relation between justice and human conduct, it seems appropriate to note this factor here. As we have already seen, justice is inextricably linked with rules of just conduct. (at least in a spontaneous order), and "rules of just conduct refer to such actions of individuals as affect others."⁴³ Admittedly, the line between conduct which affects others and that which does not may

frequently be difficult to draw. But that the distinction may be difficult to draw in practice does not affect its importance in theory.

One of the most interesting issues concerning human conduct arises when we consider the matter of consequences. As we have just seen in the preceding paragraph, in order for human conduct to raise problems of justice, it must affect other persons. And, when we talk about the effects of an action on other persons, we are talking about its consequences. Thus, the question which must be answered is, what sort of consequences are relevant to judgements of justice?

Of course, like the analysis of volitionality, the analysis of consequences is a study unto itself. Hence in a work of this nature one cannot hope to do more than scratch the surface of some of the major issues. For that reason, our consideration will be limited to those issues raised by Hayek either expressly, or implicitly, in that they are fair rejoinders to points he makes.

There are a variety of approaches one can take to the study of consequences, and the alternatives are by no means mutually exclusive. One could, for instance, begin by distinguishing the results of an action from its consequences. Or, one could concentrate on the distinction between proximate and distal consequences. And, in some contexts, e.g. the realm of legal decisions, one might choose to distinguish factual consequences from logical ones. Hayek utilizes none of these approaches. Instead, he concentrates his attention on two categories: intended and foreseeable consequences.

If there is one aspect of his position which is clear, it is that justice is concerned with the intended consequences of human action. "Justice, like liberty and coercion, is a concept which, for the sake of clarity, ought to be confined to the deliberate treatment of men by other men."⁴⁴ Or again, "[t]he attribute

of justice may thus be predicated about the intended results of human action but not about circumstances which have not deliberately been brought about by men."⁴⁵ Thus, whatever a man intends to bring about, and in fact does bring about, falls within the realm of justice. That much seems to be clear.

There are, however, several difficulties with the notion of intended consequences with which Hayek does not deal. For instance, there is the question of intended consequences which do not eventuate. How are we to treat such a situation for purposes of justice. There are really two situations which must be considered here: that in which the intended consequences would be just, and that in which the intended consequences would be unjust.

Let us take the latter first. Consider a simple example, an attempted murder which fails through no fault of the prospective murderer. (Quaere, whether this situation actually raises an issue of justice. But notwithstanding any doubt thereon, it does illustrate the point with which we are concerned.) If we consider solely the consequences which have actually eventuated, we must conclude that the actor has not done wrong. (I speak of doing wrong here to allow for the possibility the case may not actually raise a problem of justice.) But this seems a counter-intuitive and most undesirable result. Moreover, in terms of the actual criminal law, we know it to be a counter-factual result. That is to say, under the criminal law the actor is judged in terms of what he intended to accomplish. (For present purposes it is irrelevant that the penalty for an attempted offense may be less than that for a committed offense.)

Now, the question is how would Hayek deal with such a situation, keeping in mind that he does not specifically address the point at all. It is my belief that he would treat the intended, albeit unrealized, consequences as a fitting subject for a

judgement of justice. I take this position for three reasons. First, the contrary position would, as I have already noted, be counter-intuitive. While the fact in and of itself is not determinative of anything, when combined with the fact that Hayek does not argue the contrary position, it becomes significant. It seems to me unreasonable to impute a counter-intuitive position to a theorist, when he does not espouse that position either expressly or implicitly.

The second reason I offer in support of the position I have suggested is that the contrary result would be incompatible with the heavy emphasis which Hayek places on personal responsibility. As I alluded to earlier in the discussion of determinism, personal responsibility is a cornerstone of Hayek's philosophy, both in a descriptive and in a normative sense. That is to say, his view of society assumes both that individuals are responsible for their own actions and that they should be so responsible. Now, if responsibility has any applicability at all, it must certainly apply to the consequences an individual intends to bring about. Arguably, responsibility may extend further than that. But it would be a strange notion of responsibility indeed which did not extend at least so far.

The final reason why I believe that Hayek would treat these intended but unaccomplished consequences as being within the realm of justice is that this position is compatible with what he actually says about justice and consequences, while the contrary position is not. Consider again the statement quoted above: "[t]he attribute of justice may thus be predicated about the intended results of human action but not about circumstances which have not deliberately been brought about by men." What we are warned against is predicating justice of circumstances which were not deliberately brought about. To hold a man responsible for intended but unaccomplished consequences is not

incompatible with this exclusion. Moreover, it is compatible with predicating justice as to the intended results of human action. This reason, taken together with the other two, seems to me ample justification for concluding that Hayek would include within the realm of justice intended consequences which do not, in fact, eventuate, provided that those intended consequences are unjust.

But what of the counterpart to this situation. By this I mean a situation in which the actor intends to accomplish something which would be just, but actually accomplishes something different which is unjust. The story of Isaac, Jacob, and Esau comes readily to mind here.⁴⁶ Isaac, who is blind, intends to bestow his blessing upon Esau, but bestows it instead upon Jacob who has impersonated Esau. Has Isaac acted unjustly?

It seems to me that the same arguments used above here dictate that the answer is no. To say that Isaac has acted unjustly is counterintuitive, and there is no explicit basis in Hayek for drawing this conclusion. To say that Isaac has acted unjustly is to hold him responsible for something which (according to the Old Testament account) was beyond his control. And this flies in the very teeth of the notion of personal responsibility. Finally, to say that Isaac has acted unjustly is to predicate justice about circumstances which were not deliberately brought about by Isaac. In short, there seem no grounds whatsoever for saying that Isaac has acted unjustly.

This, of course, is not to say that no injustice has been committed. There has been, but the injustice is the act, the intended and deliberate act of Jacob. Admittedly, the state of affairs -- the depriving of Esau of Isaac's blessing -- is the same whether we look from Isaac's position or Jacob's. But this illustrates well Hayek's contention that it is never states of affairs as such which are just or

unjust, but only the conduct which produces them. This may sound like hair-splitting, particularly in the circumstances under consideration. But that would be too facile a judgement. Had Jacob's action in some way been a mistake, i.e. non-intentional, the state of affairs would still have been the same. That is, Esau would have been deprived of the blessing. But in these circumstances the predication of justice would clearly be inappropriate. We might describe the state of affairs as unfortunate, or unfair, or inappropriate. What we would not do is describe them as unjust.

To sum up then, justice and injustice may properly be predicated only of the intended consequences of human action. This remains the case even in those situations in which the intended consequences are different from those which actually result. For Hayek unintended consequences may never be judged just or unjust, intended consequences must always be so judged, even when they fail to eventuate.

So far so good. However, to this point we have been speaking as if there could never be any doubt as to what the intended consequences of an action were. But is this necessarily the case? There is apt to be some confusion here, so let me make clear what it is about which I am concerned. I am not concerned with the simple empirical question of what the actor intended to accomplish by his action. Although there may be situations in which this question will be difficult to answer, it remains an empirical question, and as such of limited theoretical interest.

My concern here is with the way in which the actor categorizes his action -- assuming all the time that he is being honest in explaining his intent to us. An actor may categorize his action so narrowly as to exclude from consideration what would normally be thought to be significant consequences. A standard example of this (albeit not realistically relevant for our purposes) is to describe an action as squeezing

the trigger of a gun. Under this description the actor might seek to limit the consequences of his action to causing the firing pin to strike a bullet. Alternatively, the actor might categorize his action so broadly as to exclude from consideration what would normally be thought to be significant consequences. For example, an action might be described as making the water level in the bathtub rise, glossing over the fact that this was done by holding a small child under the water.

Such cases seem so obviously contrived that it is difficult to imagine a serious question of justice arising in the context of one. But given the popularity of this question, i.e. the categorization of an action, it seems fair to ask how Hayek would deal with it. One possibility depends on the idea of responsibility. As we have already seen, responsibility is closely related to Hayek's stress on the intentional consequences of human conduct. Justice is not predicated of the unintended consequences of action because human beings are not to be held responsible for things beyond their control. This would suggest at least a rough equivalence between intended consequences and consequences within the actor's control. In the situations under consideration, what we might call the untoward circumstances are within the actor's control. He might not categorize his action so as to depict these circumstances as intended consequences. But, in terms of what appears to be the relevant factor -- responsibility -- they are identical to intended consequences. It would, therefore, appear not unreasonable to attribute such circumstances to the actor, irrespective of whether he himself treats them as consequences of his action.

That is one way in which Hayek might approach this sort of problem. There is also another way, and that involves the notion of foreseeability. Whether or not consequences are foreseeable is a

totally distinct question from whether they are intended. Hence, if Hayek would predicate justice of foreseeable consequences, another route is open to bring the above situations within the realm of justice. This because in these types of situations the consequences with which we are concerned are foreseeable, regardless of how the actor chooses to categorize his specific action.

And so the question to which we now turn is, does Hayek treat foreseeable consequences as within the realm of justice. Let me note at the outset that the question of foreseeability has a wider significance than the somewhat contrived problem which has just lead us to this topic. Its most obvious relevance is in situations in which a person intends to produce a given consequence, and acts so as to produce that consequence, knowing full well that in so doing he will also produce another consequence which is in itself undesirable. In terms of Hayek's social philosophy the most important occurrence of such questions is in the context of the market economy, for it may be argued that while certain results of such an economy are unintended, they are nonetheless foreseeable. This particular issue is one with which we will deal in greater detail later.

Unfortunately, Hayek's position on foreseeability and justice is far from clear. Quite frequently he talks as if justice were solely concerned with intentional consequences. For instance, in the passage cited a few pages back he says, "[t]he attribute of justice may thus be predicated about the intended results of human action".⁴⁷ Note, there is no mention of foreseeability. And silence suggests omission.

On the other hand, there are at least three passages in which he makes the negative statement that we cannot treat as just or unjust consequences which are neither intended nor foreseen. Each of these passages arises in the context of a discussion of

so-called 'distributions' in a market economy. For example, "if it is not the intended or foreseen result of somebody's action that A should have much and B little, this cannot be called just or unjust."⁴⁸

From this second line of passages it would seem fair to conclude that justice can be predicated of consequences which, though unintended, are foreseen. But what then of the contrary line of passages? Ideally one would like to be able to reconcile in some way these two lines of thought. Yes, it could be argued that the first set of passages do not specifically exclude foreseeable consequences, but rather are silent concerning them. And, contrary to what I said above, perhaps silence does not imply exclusion. Yet, in the context in question, the silence does seem significant. When the question is what sort of consequences are relevant to judgements of justice, to say intentional consequences and to say no more, strongly suggests that it is only intentional consequences which are relevant.

My point here is perhaps an odd one, and may even seem inappropriate. Be that as it may, I do not think the two lines of thought are reconcilable. Instead, I think this is an excellent example of the sloppiness which sometimes creeps into Hayek's thoughts about justice. At times he tells us that justice is concerned only with intentional consequences, and at other times he tells us that it is concerned with both intentional and foreseeable consequences. Such inconsistency I consider wholly indefensible in a reputable scholar, and it is for that reason that I call attention to it.

In any event, given the contrary lines of thought, it appears to me clear that the second must be treated as controlling. Foreseeable consequences must be treated as within the realm of justice. I conclude this because it would be an odd notion of responsibility indeed which ignored the foreseeable

consequences of action. It would be so counter-intuitive that one could fairly expect the position to be justified in some way. But this is not done. Thus, while there are passages which, by silence, exclude foreseeable consequences from the realm of justice, the lack of any argument to support this position, combined with passages which expressly include such consequences, leads me to maintain that Hayek's conception of justice can and must be predicated of both intended and foreseeable consequences.

Granting this, it remains to determine what Hayek would understand by foreseeable consequences. I am aware of only two instances in which he specifically discusses the question of foreseeability, and neither of these occurs in Law, Legislation and Liberty. The first occurs in the context of a discussion of individualism. In this passage he sets forth what might be called a strict or tight standard of foreseeability. It stresses that foreseeability should be judged only from the viewpoint of the actor whose conduct is in question.

The real question, therefore, is not whether man is, or ought to be, guided by selfish motives but whether we can allow him to be guided in his actions by those immediate consequences which he can know and care for or whether he ought to be made to do what seems appropriate to somebody else who is supposed to possess a fuller comprehension of the significance of these actions to society as a whole. 49

To paraphrase, foreseeability is restricted to only what the individual himself can foresee and does not take in what can allegedly be foreseen by some expert. The second passage, though more succinct, squares with the first one:

This means that what he is allowed or required to do must depend only on circumstances he can be presumed to know or be able to ascertain.

No rule can be effective, or can leave him free to decide, that makes his range of free decisions dependent on remote consequences of his actions beyond his ability to foresee. 50

The difficulty which I see with Hayek's position is that it rests upon a distinction which is not nearly so clear as he appears to think. It takes little thought to realize that there must be some objective standard of foreseeability. This because if we literally judge foreseeability from the viewpoint of the individual in and of himself, there would seldom be legitimate grounds to criticize anyone. Yes, there would be situations in which it could be said that the actor saw the consequences of his action and deliberately chose to ignore them. But more commonly we will be faced with a situation in which the actor can fairly say that he never saw or anticipated that certain consequences would result. To accept this statement as the final word, would be to accept a standard of foreseeability which smacked of solipsism.

Rather than this, it seems plausible that Hayek must intend some sort of reasonable man standard similar to that found in tort law: viz., foreseeability is to be assessed in terms of what a reasonable man in like circumstances would foresee. However, once we admit the reasonable man standard, we open a door by which expert opinion can creep back in, for surely the reasonable man would take heed of expert opinion.

How then are we to balance Hayek's patent desire for a strict standard of foreseeability with the need for a reasonable man standard? The answer, I believe, lies in Hayek's epistemology. As we saw in an early chapter, Hayek is a proponent of what he calls critical rationalism and a persistent and determined opponent of what he calls constructive rationalism. He maintains that, given the limits of the human mind and the vagaries of the world in which we live, we

have at very best a narrowly circumscribed ability to foresee the consequences of our actions. The appropriate standard of foreseeability follows from this premise: foreseeability must rest within the limitations of critical rationalism. An individual can be held responsible for those consequences which a reasonable man standing in his situation would have foreseen, again within the limits of critical rationalism. As to expert opinion, there is no difficulty in taking such into account, provided it too remains within the bounds of critical rationalism. Difficulty arises -- and this I think is Hayek's source of concern -- when the expert attempts to engage in constructive rationalism. It is such transcendental foresight which he declines to impute to the individual. And it is consequences which can be 'foreseen' only in this sense which he excludes from the province of justice. Admittedly, the distinction will still be difficult to draw. But the difficulty now is at least practical rather than theoretical. Thus, though difficult to draw, the distinction is at least significant.

Let us now turn to what is probably the most important gap in Hayek's consideration of human action. That gap is the problem of omissions. To the present we have been concerned with situations in which the actor has affirmatively acted. But what of situations in which the actor declines to act? In one sense in such situations the actor does nothing. But in another sense doing nothing is itself an action. The question then is, can justice be predicated of the consequences of such actions by omission?

As already indicated, Hayek nowhere specifically confronts this issue. When speaking of the relation between justice and human conduct his concern is almost exclusively intended consequences. And from the context it is clear that he is thinking in terms of affirmative action. There are, however, a few passages in which, seemingly unwittingly, Hayek makes some

mention of failure to act. For instance he tells us that justice can be meaningfully attributed only to human action and not to any state of affairs as such, without reference to the question whether it has been, or could have been deliberately brought about by somebody. [emphasis added] 51

Or again he says:

If we apply the terms [just or unjust] to a state of affairs, they have meaning only in so far as we hold someone responsible for bringing it about or allowing it to come about. [emphasis added] 52

Taking his words literally, we can conclude that justice is concerned with states of affairs which could have been brought about by someone, and states of affairs which someone has allowed to come about. The trouble is, this conclusion appears to go a long way towards completely emasculating the distinction he has attempted to draw between justice as a predicate of human conduct alone and justice as a predicate of states of affairs. But is that really the case?

Let us begin with the first passage. While not every state of affairs could have been deliberately brought about by someone, there are certainly a great many which could have been. To say that all such situations can have justice predicated of them is to expand the realm of justice far beyond the limits which Hayek is otherwise trying to impose. Or is it?

Let us consider a little further what could be meant by saying that justice can be predicated of any state of affairs which could have been brought about by somebody. Consider first a state of affairs which would be called just, if only someone had deliberately brought it about. Is Hayek to be understood as saying that anyone who could have brought this state of affairs about, even though they did not in fact do so, has acted justly? That conclusion seems too ludicrous to be possible. Consider then a state of affairs which could be called unjust, if only someone had deliberately brought it about. Is Hayek here to

be understood as saying that anyone who could have brought this state of affairs about, even though they did not in fact do so, has behave unjustly? This conclusion too seems beyond the pale.

But if we eliminate both of these possibilities, what is it that Hayek is saying? I suggest that the only possible meaning of this passage lies in treating it as a most misleading elliptical statement. The state of affairs which could have been brought about can only refer to the contrary of the state of affairs which actually exists. Moreover, we must assume that the state of affairs which actually exists is one which would be called unjust, if only someone had deliberately brought it about. What Hayek is then saying is that anyone, who had it within his power to prevent the occurrence of a state of affairs which would be called unjust if someone had deliberately brought it about, has in fact acted unjustly by failing to prevent the occurrence of that state of affairs. That interpretation is at least plausible. This is particularly so when you consider that this passage has now become nothing more than a rather tortuous restatement of the other passage I have cited; namely, that justice can be predicated of states of affairs which people have allowed to come about.

Granting that that is what Hayek is saying, it still remains to ask whether he can really mean what he is saying. Does he really mean that justice can be predicated of any state of affairs which someone has allowed to occur? The answer to this question is most certainly no. Although we have had little occasion to refer to it in this section, we must recall yet again that for Hayek the sine qua non of justice is rules. And, in a spontaneous order those rules will be rules of just conduct. Justice can be predicated of a failure to act if and only if that failure to act is proscribed by a rule of just conduct. Hence, it is not the case that every failure to act raises a problem of justice.

It would be impossible to attempt here to give any even faintly detailed listing of the situations in which Hayek would see an obligation to act. Obviously such a listing would depend upon the system of rules which exist in the society under consideration. And even on the broad level of spontaneous orders in general no meaningful catalogue is possible. The best that can be done is to draw attention to two factors which suggest that the number of situations in which action will be obligatory is quite limited. The points which follow have been made in greater detail in an earlier chapter. But it is worthwhile touching on them again here.

The first factor is Hayek's contention that the rules of just conduct are predominantly negative in form. They aim to define the individual's protected sphere of responsibility, not by telling him what he may do, but by telling others what they may not do. This emphasis on proscription rather than prescription is the result of two factors. The primary one is that the function of a spontaneous order, to the extent it can be said to have a function, is to provide the maximum possible opportunity for individuals to pursue their own ends secure from the interference of others. This is best done by negative rules.

The other factor which is here pertinent is the increasing size of what Hayek calls the Great Society. Justice requires that the same rules be applied to all. As a society grows beyond the tribal level, this requirement becomes feasible only if the rules abstract more and more from particulars. Patently, the larger a society the fewer particulars an individual will know about any of his fellows. And it is negative rules rather than positive ones which can most readily be abstracted from particulars.

In addition to the restrictions imposed by the rules of just conduct there is also another element which serves to limit the scope of obligations.

to act. This is the fact that society is a spontaneous order rather than a deliberate construction, a cosmos rather than a taxis. For Hayek this means that many states of affairs are altogether outwith the sphere of human control. They are the result of human action but not of human design. And the maintenance of the spontaneous order dictates that such states of affairs should continue to remain outwith the sphere of human control. The most notable example of this phenomenon are the distributions of the market economy. Thus even were it possible to articulate rules of just conduct applicable to such states of affairs, the need to maintain the spontaneous order would dictate that they not be brought within human control. And that is simply another way to say that there should be no obligation to act in regard to such states of affairs.

The long and short of all this is that for Hayek there will be very few situations in which an individual is required to act in a particular way, as distinct from not acting in a particular way. There are, therefore, very few situations in which by allowing a state of affairs to come about an individual has engaged in conduct of which justice can be predicated. In this, as in so many things, his position stands in marked contrast to the position of the majority of contemporary social theorists. To give but a single example, consider again Hayek's reference to congenital defects.

Only if we mean to blame a personal creator does it make sense to describe it as unjust that somebody has been born with a physical defect 53

Now compare what John Rawls has to say about a similar problem.

The natural distribution [of talents] is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply

natural facts. What is just and unjust is the way that institutions deal with these facts. 54

In a later chapter we will consider this problem of failures to act, in relation to the critique of social justice.

To this point I have been concerned with analyzing the conduct element of human conduct. But to fully understand Hayek's position on the relationship of human conduct and justice we must also consider the human element. That is, we must consider who or what can act so as to come within the realm of justice.

Fortunately, Hayek's position is, for a change, quite clear and consequently we can dispose of this issue relatively quickly. Individuals, groups of individuals, and organizations can all act justly or unjustly; society, however, cannot.

Evidently, not only the actions of individuals but also the concerted actions of many individuals, or the actions of organizations, may be just or unjust. Government is such an organization, but society is not. And, though the order of society will be affected by actions of government, so long as it remains a spontaneous order, the particular results of the social process cannot be just or unjust. 55

Little comment is warranted on those entities which are included. If the actions of an individual do not constitute human conduct, what does? Similarly, if the actions of a single individual are included, why not the actions of several individuals acting together? Organizations may at first give pause for thought, but in effect they are no more than a very large group of individuals acting in concert. And, government is patently an organization. The factor which is common to each of these cases is that there is some entity capable of deliberate, purposeful action.

It is the absence of this factor which justifies the exclusion of society. For Hayek society is not an entity capable of deliberate, purposeful action. It is instead a spontaneous order which functions by human action but not human design. Obviously the most direct way to challenge this exclusion of society from the group of entities which can engage in human conduct is to attack its status as a spontaneous order. One might argue that society is not in fact a spontaneous order. Alternatively, one might argue that society should be changed from a spontaneous to a directed order.

There is, however, another way which would leave unchallenged Hayek's basic premise. That is to argue that, notwithstanding the status of society as a spontaneous order, the actions attributed to it are ultimately the actions of individuals. And, the actions of individuals can be adjudged to be just or unjust. As we have seen, however, it is only the intended or foreseeable consequences of an individual's actions of which justice can be predicated. The problem then becomes to show that the actions of society which it is sought to judge can fairly be viewed as the intended or foreseeable consequences of individual conduct. This line of attack would be especially apropos when considering whether market distributions can be adjudged just or unjust. For now I will content myself with merely noting the possibility of this line of attack. But it will receive greater consideration later in the thesis. In any event, notwithstanding the viability of the position, Hayek does maintain that justice cannot properly be predicated of the actions of society.

And with that we complete our analysis of human conduct as it relates to justice. There remain however, two further points which pertain to what I have designated as Hayek's views of the subject matter of justice. These points are both negative, involving

things which Hayek maintains justice is not concerned with. Like the topic of human conduct, their connection with justice is their relation to the rules which are the sine qua non of justice. But unlike the topic of human conduct, their focus is, not what the rules of justice are concerned with, but rather what those rules are not concerned with. These two points are apparently singled out for consideration because they are, in fact, frequently treated as within the subject matter of justice. And for that reason Hayek takes the trouble to specifically exclude them.

The first of these exclusions is found in Hayek's frequent warning that justice is concerned only with transactions and not with the results thereof.

[J]ustice is not concerned with the results of the various transactions but only with whether the transactions themselves are fair. 56

This sounds a bit like the old adage: it doesn't matter whether you win or lose, it's how you play the game which counts. And in fact, Hayek cites John Locke for virtually the identical point.

It was from this tradition that John Locke and his contemporaries derived the classical liberal conception of justice for which, as has been rightly said, it was only 'the way in which competition was carried on' [Footnote omitted] that could be just or unjust. 57

At first blush this might sound like an admonition to concern ourselves solely with what people do as distinct from the consequences of what they do. But, even were it possible to keep separate an action and its consequences, we have already seen that justice is concerned with the consequences of human action, provided they be intended or foreseeable. What then is Hayek about when he stresses the transaction over the result? I would suggest that his aim is to emphasize that factors beyond the control of the actor can and

frequently do significantly influence the outcome of his actions. Such factors are of two sorts: the concurrent or subsequent action of others, and what might be called the role of chance. To the extent that these factors are responsible for a particular outcome, that outcome cannot have justice predicated of it.

Since the consequences of applying rules of just conduct will always depend on factual circumstances which are not determined by these rules, we cannot measure the justice of the application of a rule by the result it will produce in a particular case. ... That it is possible for one through a single just transaction to gain much and for another through an equally just transaction to lose all, [Footnote omitted] in no way disproves the justice of these transactions. Justice is not concerned with those unintended consequences of a spontaneous order which have not been deliberately brought about by anybody. [Footnote omitted] 58

This is the issue with which Hayek is concerned when he says that justice must be concerned with transactions and not results.

The stress on transactions over results also has significance in another way. It is relevant to assessing the justice of rules. As we saw in the first section of this chapter, to say that a rule is unjust is to say that it is not a part of and/or compatible with the existing system of rules. But in making this judgement we must concern ourselves with the transaction, i.e. the conduct which the rules prescribes or proscribes as the case may be, and not with the results of applying the rule in any single case. As the legal maxim puts it, hard cases make bad law. And in Hayek's own words:

A more important point is that the rules which have been adopted because of their beneficial effects in the majority of cases will have these

beneficial effects only if they are applied to all cases to which they refer, irrespective of whether it is known, or even true, that they will have a beneficial effect in the particular case . 59

Whether a rule will have a beneficial effect in a particular case is the result. And it is, therefore, because we must disregard the effects in particular cases that our concern is with transactions and not results.

The other point to be discussed is Hayek's repeated assertion that justice is concerned only with external performance and not with moral merit.

The concept of justice has application only in so far as all will be equally rewarded according to the value of the objective results of their efforts and not according to someone's judgement of the merit they have thereby acquired. 60

The rationale for this position is twofold. First, in a spontaneous order reward according to moral merit is irrelevant, if not outright undesirable. Second, in any event, moral merit is not susceptible to objective assessment.

The first argument depends upon Hayek's espousal of the market order or catalaxy. It rests on the contention that in such an order prices, wages, and the like, do not in fact function as rewards. Rather they function as indicators of appropriate courses of action.

Their function is not so much to reward people for what they have done as to tell them what in their own as well as in general interest they ought to do. We shall then also see that, to hold out a sufficient incentive for those movements which are required to maintain a market order, it will often be necessary that the return of people's efforts do not correspond to recognizable merit, but should

show that, in spite of the best efforts of which they were capable, and for reasons they could not have known, their efforts were either more or less successful than they had reason to expect. In a spontaneous order the question of whether or not someone has done the 'right' thing cannot always be a matter of merit, but must be determined independently of whether the persons concerned ought or could have known what was required. 61

It is for this reason, i.e. to facilitate the functioning of the spontaneous order, that moral merit is considered outwith the concern of justice.

There is an interesting aside worth noting here. In Social Justice David Miller maintains that a theory of justice can be understood only in the context of the overall view of society which it presupposes. He identifies three ideal-types of theory of justice: rights based, desertbased, and need based. He then further identifies the rights based theory of justice with a hierarchical society, the desert based with a market society, and the need based with a tribal or communitarian society. What is interesting is that while Hayek espouses a market society, he specifically rejects the idea of a desert based theory of justice. In Miller's terms, Hayek's theory of justice would have to be called a rights based. And this should, per Miller, be found in the context of a hierarchical society. So much for Miller's analysis.

The second justification which Hayek gives for being concerned with external performance and not moral merit is more factual and less ideological than the first. It is succinctly stated in the words of David Hume which Hayek quotes:

So great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct could ever follow from it.
[Footnote omitted] 62

To paraphrase, the problem with basing justice on moral merit is that we cannot readily identify moral merit.

Why is this so? To assess and act upon moral merit two factors are necessary. One, there must be a commonly accepted hierarchy of values which constitute moral merit. Two, we must be able to comprehend a variety of factors which go far beyond the actual results achieved.

Reward according to merit must in practice mean reward according to ascertainable merit, merit that other people can recognize and agree upon and not merit merely in the sight of some higher power. Assessable merit in this sense presupposes that we can ascertain that a man has done what some accepted rule of conduct demanded of him and that this has cost him some pain and effort. Whether this has been the case cannot be judged by the result: merit is not a matter of the objective outcome but of subjective effort. The attempt to achieve a valuable result may be highly meritorious but a complete failure, and full success may be entirely the result of accident and thus without merit. 63

The problem, of course, is that given Hayek's espousal of critical rationalism and the spontaneous order there is no possibility of knowing all of these aspects for any particular action.

Reward according to merit thus presupposes that we know all the circumstances which led to a particular performance. But in a free society we allow the individual to decide himself about his actions because we do not know those very circumstances which determine how meritorious his achievement is. It is therefore necessary in a free society to reward the individuals according to the value of the services actually rendered to their fellows, a value which has often little relation to the subjective merit they have earned in rendering them. 64

Thus, to attempt to assess conduct by moral merit instead of by external performance is to engage in a quixotic activity. It is to pursue a goal which we can never have any hope of even approaching, much less of attaining. It is for this reason that justice is predicated of external performance and not of moral merit.

That completes this examination of Hayek's position on the appropriate subject matter of justice. Probably the most significant aspect of Hayek's position is that, as compared with the positions of other theorists, it envisions a relatively narrow realm within which it is proper to predicate justice. Many situations which other theorists see as raising problems of justice are for Hayek outwith the sphere of justice.

C. Exegetical Criticism

In the first part of the thesis, including the instant chapter, my concern is primarily exegetical. In the instant chapter that aim translates into trying to explain precisely what it is that Hayek says about justice, a task that is far from easy. It has not been completely possible to avoid critical comments, but for the most part I think the first two sections of this chapter can be considered essentially exegetical. This section, on the other hand, will be more critical than exegetical. At first blush that would suggest deferring this section to a later part of the thesis. However, I believe that the criticisms to be made are still exegetical, in that we cannot get a complete grasp of Hayek's conception of justice without considering the issues raised herein. It is this idea of exégesis by critique which I have tried to suggest with the title of this section.

The first point I wish to consider is Hayek's contention that the ultimate justification for having a conception of justice is our unavoidable ignorance. As we have already seen he maintains that rules are the device by which we compensate for our limited rationalism.⁶⁵ Were we in fact able to comprehend all of the facts pertinent to any decision, as well as the relative importance thereof, then there would be no need for a concept of justice.

[I]n a society of omniscient persons there would be no room for a conception of justice: every action would have to be judged as a means of bringing about known effects, and omniscience would presumably include knowledge of the relative importance of the different effects. Like all abstractions, justice is an adaptation to our ignorance -- to our permanent ignorance of particular facts which no scientific advance can wholly remove. It is as much because we lack the knowledge of a common hierarchy of the importance of the particular ends of different individuals as because we lack the knowledge of particular facts, that the order of the Great Society must be brought about by the observance of abstract and end-independent rules. 66

In short, were we able to overcome our perpetual ignorance, then we could dispense with the concept of justice.

This strikes me as a very dubious and contentious conclusion. Even in the way Hayek uses the word justice clearly appears to be a normative concept. It deals with what ought to be the case in certain circumstances. How then could any increase in knowledge, even to the extent of omniscience, eliminate the need for justice? If you will, knowledge is an is, justice is an ought. Even assuming that omniscience entails not only knowledge of facts, but knowledge of the relative weight of values as well -- and to speak of

omniscience in this context seems extremely odd --, this does nothing to ensure that any individual will act in accord with the scale of values. The total dependence of justice upon ignorance which Hayek espouses would make sense only if knowing what was appropriate to do ensured that one did what was appropriate to do.

Possibly Hayek would make just such a claim. But I find it difficult to imagine what kind of arguments he could give in support thereof. I suspect instead that the difficulty I see here has arisen because Hayek has failed to distinguish in his own mind two related but separate ideas associated with the use of rules. Rules both identify conduct which, for whatever reason, it is desired to bring about, and at the same time they tell us that that conduct should be engaged in. In other words, rules tell us both what to do and to do it. They both describe and prescribe. It is only this first aspect, the identification of the desired conduct, which is affected by Hayek's presumption of omniscience. Omniscience can eliminate the descriptive, but not the prescriptive aspect.

In the face of this, were Hayek to yet maintain that omniscience would eliminate any need for the concept of justice, he would almost have to be denying that there is a normative element associated with justice. Were he to do this, I would have to say two things. First, I apparently do not yet understand the way in which he is using the word "justice". Second, to the extent I do understand him, his use of the word is so radically removed from the general usage, that it seems inappropriate to use the word "justice" at all. In short, I am willing to grant that there is a connection between justice and ignorance. But even within the confines of his own theory I think that Hayek has overestimated the import of this connection. Even in a society of omniscient people, there would still be a place for justice.

The next issue I wish to consider is one I have already alluded to several times in this chapter. Hayek's conception of justice appears to be extremely legalistic. But is this a fair categorization of it? To begin with, let us get a working idea of what is meant when we speak of a legalistic conception of justice. The following thoughts of Chaim Perelman serve that function quite nicely. Legal justice entails:

[T]o be just means to accord to each person what the law entitles him to. This conception entitles us to say that a judge is just, that is, impartial and uncorrupt, when he applies the same laws to the same situations (in paribus causis paria iura). To be just is to apply the laws of the country. ... In effect, to be just is to apply the rules of a given juridical system, and to be unjust is to misapply them. ⁶⁷

If we substitute the phrase "rules of just conduct" for "law" in the above quotation, it becomes apparent that Hayek's conception of justice fits this definition quite nicely. That Hayek's justice is a legal justice becomes even more apparent when we consider the alternative types of justice which Perelman gives.

1. To each the same thing.
2. To each according to his merits.
3. To each according to his work.
4. To each according to his needs.
5. To each according to his rank. ⁶⁸

Patently, Hayek's conception of justice would fit none of these classifications.

Instead, as we have seen, justice for Hayek is totally dependent on an existing system of rules. Justice requires a precise articulation and development of the rules of that system. And, it requires that those rules be universally applied. Moreover, much of the discussion of justice occurs in the context of applying rules, as distinct from complying with

them. The concern is with the authorities who are articulating and developing the rules, and not with the individual who is attempting to guide his behaviour by the rules. The only distinction, but an important distinction, between Hayek's justice and the common view of legal justice is that for Hayek justice is prior to law and not vice versa.

Ordinarily the significance of classifying a conception of justice as legalistic is that the term legal justice suggests a rigid hide-bound system. Certainly there is not the same leeway of judgement in Hayek's system as there would be in one based, for example, on justice according to need. However, as we have already seen Hayek's conception of justice does allow room for prosthetic action. The problem I see here is of a different nature. Hayek's discussion of justice occurs so exclusively in a legal context that it is difficult to envision how, if at all, it would function when we were dealing with a situation outwith the legal system. To be more specific, the question is. would Hayek's conception of justice be functional in the moral, as distinct from the legal, realm. Could Hayek make judgements of justice in that realm, or do his thoughts on justice make sense only in the context of a legal system?

Let it be noted at the outset that I know of nowhere where Hayek expressly limits his conception of justice to the legal realm. Nor am I aware that he anywhere expressly excludes the moral realm from the sphere of his conception of justice. On the other hand, in Chapter Eight of Law, Legislation and Liberty, which is the most detailed and extended discussion he gives of justice, he takes time to distinguish between law and morality.⁶⁹ The pertinence of this particular discussion could be explained by pointing out that it follows a discussion of legal positivism and precedes a discussion of natural law. But even so, given that the

subject matter of the chapter is justice, at least a faint suspicion is raised that, in terms of Hayek's conception of justice, there may be a reason to distinguish law from morality.

When we turn to the essence of Hayek's conception of justice the suspicion grows even stronger that what he is saying may not be applicable to the moral realm. The inapplicability is not one of exclusion as such. Rather it is that it is difficult to make what Hayek says about justice functional in the context of moral, as distinct from legal, problems.

Where Hayek's conception of justice would be applicable to the individual moral decision is in the requirement to apply the same rules to all. This, as we have already noted, is very much like the idea of universalization or even the first formulation of the Categorical Imperative. It makes perfect sense to require that in making a moral decision the individual act in accord with a rule which he is applying to all. To this extent Hayek's thoughts on justice seem equally relevant to the legal and the moral realm. However, it must be kept in mind that when Hayek is discussing justice, it is this aspect which gets the least attention.

The bulk of Hayek's attention and the real stumbling block is the notion of the articulation and development of the rules of just conduct. This seems to take for granted the existence of some central authority, like the courts, which is doing the articulating and developing. But, as we have seen in an earlier chapter, it is the very absence of such a central authority which distinguishes law from morality. Who then is to do this articulation and development in the moral realm? It might be suggested that the individual, in deciding what to do, engages in this process. But this seems wholly unrealistic as an attempt to describe how individuals make moral decisions. The process which Hayek is describing is a

very deliberate and formal process. It is not unlike the task of Dworkin's Hercules.⁷⁰ Perhaps the moral philosopher, or a particularly thoughtful individual in the quiet of his study, might engage in something approaching this process. But certainly the typical individual in the typical context of a moral decision does not engage in anything even faintly akin to the process Hayek describes. And yet, it certainly makes sense to speak of such individuals acting justly or unjustly.

So what are we to conclude from this? First, let me make it clear that I am not arguing that Hayek denies the applicability of justice to the moral realm. What I do think is that Hayek is simply not concerned with the moral realm. His aim is not to set forth a theory of justice which encompasses every context in which the word "justice" might be used. Instead, he is concerned with the way that word is used in certain contexts. The moral realm is simply not a context with which he is concerned. It would be misleading, therefore, to say that Hayek's conception either is or is not applicable to the moral realm. Rather, what we should say is that the moral realm is irrelevant to what Hayek has to say about justice.

The final point which I wish to make in this section is almost opposite in effect to that which I have just made. The previous discussion suggested that there was a very definite narrowing to the scope of Hayek's conception of justice. The instant point suggests that in fact the scope of that conception may be far broader than Hayek thinks.

The argument begins by noting that Hayek does recognize the existence of a sense of justice.

Though our sense of justice will generally provide the starting point, what it tells us about the particular case is not an infallible or ultimate test. It may and can be proved wrong. 71

What determines whether what the sense of justice tells us is right or wrong is whether what it suggests can be brought within the confines of the existing system of rules of just conduct. As an aside, it is interesting to note that the process Hayek is envisioning here has some similarity to John Rawls' reflective equilibrium.⁷² The significant difference is that unlike Rawls, Hayek does not allow for the system of rules to be corrected in light of the feelings of the sense of justice.⁷³

In any event, the sense of justice becomes important when we realize that for many people it suggests that justice should be based on factors such as desert or need, to name but two of the more common formulae of justice. That being so, the question then is whether this inclination to base justice on the criteria of desert or need (or other such criteria) can be brought within the system of rules of just conduct. Now, recall that for Hayek the notion of a rule can include what we would call both rules and principles, be they articulated or unarticulated. That being so, it is at least prima facie arguable that general principles of desert and/or need do comprise part of the system of rules of just conduct. And if they are in fact part of that system, then Hayek's justice demands that they be taken into account.

The thrust of this argument is that Hayek's conception of justice may not altogether supplant alternative conceptions. Hayek's justice, as we have seen, is essentially formalistic. It draws its substance from the particular system of rules of just conduct with which it is concerned. Should one or more of the more traditional conceptions of justice constitute a part of any particular system of rules of just conduct, then those traditional conceptions of justice and their demands would actually co-exist with Hayek's conception of justice.

With that we come at last to the end of this examination of Hayek's thoughts on justice. And having done so we are now free finally to turn our attention specifically to the critique of social justice.

CHAPTER SIX

HAYEK'S CRITIQUE OF SOCIAL JUSTICE

What we have to deal with in the case of 'social justice' is simply a quasi-religious superstition of the kind which we should respectfully leave in peace so long as it merely makes those happy who hold it, but which we must fight when it becomes the pretext of coercing other men. ¹

A. Introduction

The critique of social justice is by far the most polemic aspect of Hayek's thought. As the headnote to this chapter indicates, he derides the very mention of the concept and vehemently opposes any attempt to instantiate it in society. The purpose of this chapter is to consider the nature and basis of Hayek's attack on social justice.

This is not an easy task, for the arguments are long, confused, and repetitive. The crux of the problem is that Hayek dismisses social justice as a meaningless concept, while including at least three different senses under the aegis of meaningless. First, social justice is meaningless in that it has no single, definite, generally accepted meaning. Second, it is meaningless in that it is incompatible with Hayek's

theory of justice. That is, the demands of social justice, rather than being derivable from Hayek's conception of justice, are actually expressly precluded thereby. Finally, social justice is meaningless in that it is not attainable in a society which constitutes a spontaneous order. Hayek wanders from one to the other of these senses of meaningless seemingly at random and with no awareness that the nature of his argument changes with the sense in which he uses meaningless. It is this which causes the confusion and makes it difficult to deal with Hayek's thought in any orderly fashion.

In an attempt to facilitate discussion I have divided my analysis into three parts. The three parts are concerned respectively with: the various efforts to give some meaning to the concept of social justice; the reasons why social justice is not attainable in a spontaneous order; and, the reasons why it is dangerous to pursue social justice. It must be kept in mind, however, that these divisions are mine and not Hayek's. Consequently, it has not been possible to keep the different parts of my analysis strictly separate. In fact, most of what is said in parts two and three (Sections C and D) will have been presaged in part one (Section B). For that reason the first part of this analysis will be by far the longest, with the latter two parts being quite short in relation thereto. The remainder of this introduction will sketch the outlines of my analysis.

In the first part of the analysis my concern is with Hayek's efforts to determine the meaning of the concept of social justice. To this end, we will examine the word "social", as well as the concepts of the general welfare, equality, and distributive justice. We will see that Hayek's major objection to these concepts is not so much the vagueness of their meaning, as that they carry meanings and implications of which he disapproves. In this section we will also consider

Hayek's reaction to two situations which allegedly present a problem of social justice. Finally, we will look at Hayek's explanations for the popularity of social justice.

In the second part of the analysis we will consider why it is that social justice is unattainable in a spontaneous order. Here Hayek grants arguendo that social justice is a sufficiently meaningful goal at which to aim, and he goes on to consider precisely how that concept would have to be pursued. He argues that, inasmuch as social justice requires that the material position of every member of society be determined according to some 'rational' principle, it is incompatible with a society which constitutes a spontaneous order. This is so because within such a society the material position of individuals is determined only in part by intentional human conduct, while the vagaries of chance play an equal, if not greater, part in such determination. Hence, to control in any meaningful sense the material position of individuals the element of chance must be drastically minimized. This, however, can be accomplished only by transforming society from a cosmos/catalaxy to a taxis: that is, by transforming it from a spontaneous order to a deliberately constructed and controlled order. For this reason social justice is a goal which is meaningless so long as society remains a spontaneous order.

The third part of the analysis is an outgrowth of the second. Given the apparent desirability of social justice, the question might be asked, why not transform society in the direction of taxis, at least to the extent needed to achieve social justice? Is not the game worth the price? Hayek's reply is a resounding and categorical "No". Under no circumstances must we transform society in pursuit of the elusive goal of social justice. Desirable as social justice may seem -- and, as we shall see, Hayek questions its desirability -- pursuit of it would gravely

threaten values which are essential to society as we know it. Justice, personal freedom, personal responsibility, and morality would all be detrimentally affected by pursuit of social justice. For Hayek these are values which are of far greater importance than anything connoted by the concept of social justice.

Such then is the gist of my analysis of Hayek on social justice. And to that analysis I now proceed.

B. The Meaning of Social Justice

It seems safe to say that social justice is a concept which currently enjoys much popularity. In the political arena, for instance, social justice is the basic standard against which all activity must be judged.

The appeal to 'social justice' has nevertheless by now become the most widely used and most effective argument in political discussion. Almost every claim for government action on behalf of particular groups is advanced in its name, and if it can be made to appear that a certain measure is demanded by 'social justice' opposition to it will rapidly weaken. People may dispute whether or not the particular measure is required by 'social justice'. But that this is the standard which ought to guide political action, and that the expression has definite meaning, is hardly ever questioned.²

Similarly, social justice has become the watchword for much contemporary religious activity.

It seems in particular to have been embraced by a large section of the clergy of all Christian denominations, who, while increasingly losing their faith

in a supernatural revelation, appear to have sought a refuge and consolation in a new 'social' religion which substitutes a temporal for a celestial promise of justice, and who hope that they can thus continue their striving to do good. 3

In fact, social justice has, quite simply, been accepted as "a new moral value which we must add to those that were recognized in the past ..."4 It is, perhaps, the ultimate touchstone, for it is the standard by which we judge the good man.

The commitment to 'social justice' has in fact become the chief outlet for moral emotion, the distinguishing attribute of the good man, and the recognized sign of the possession of a moral conscience. Though people may occasionally be perplexed to say which of the conflicting claims advanced in its name are valid, scarcely anyone doubts that the expression has a definite meaning, describes a high ideal, and points to grave defects of the existing social order which urgently call for correction. 5

With all this to be said in its behalf, it is clear that social justice is a concept with paramount importance for contemporary life. No one could deny this. To question the value, or worse yet the very existence, of social justice would be akin to attacking motherhood.

The contention that in a society of free men (as distinct from any compulsory organization) the concept of social justice is strictly empty and meaningless will probably appear as quite unbelievable to most people. 6

Yet Hayek does just this, for he has the audacity to suggest that social justice is like the emperor's new clothes. If we look closely, we see that there is really nothing there.

But how can this be? Is it not true that as we observe the world around us we are constantly struck by the myriad of injustices which occur? "Are we not all constantly disquieted by watching how unjustly life treats different people and by seeing the deserving suffer and the unworthy prosper?"⁷ Certainly this is true. But in making such observations we must be careful not to confuse mere unfairness with injustice. Do we not experience the same feelings of disquietude in regard to situations which are clearly beyond any human control?⁸ Is it unjust that one farmer's crops are devoured by locusts while another's are not? Of course not! It may be unfair, but it is not unjust. Well, Hayek contends, the situation is no different as to those circumstances which rouse thoughts of social justice.

If there is doubt that this is the case, let us look behind those root feelings of disquietude at supposed social injustice and consider what it is they rest upon. To talk about social injustice, we must have some idea of what social justice is. That is the real question: what is social justice? But that question is also the problem, for, says Hayek, social justice is a meaningless term. There is no generally agreed meaning for it. It seems to mean all things to all people. Whatever the claim, when in doubt appeal to social justice. Moreover, not only is there no agreement on the particular application of the concept, but there is not even a basic principle thereof to guide the efforts at application.

Now, this is not to deny that there are attempts to imbue the concept with real meaning. Rather, it is to state that if we look carefully at the proffered meanings for social justice, we find that they are so empty as to provide us with no real guidance. To see that, let us now consider carefully some of the different attempts to imbue the concept of social justice with meaning. It seems logical to

start with the word "social". We already know what justice is -- see the preceding chapter --, so if we can determine what social is, we will know the meaning of social justice. Unfortunately, the facts do not conform to our logical expectations.

Certainly social has, or perhaps it is better to say had, a definite meaning: pertaining to the functioning of society. But in that case social justice and justice must be one and the same, for all justice is social in this sense.

Originally 'social' had of course a clear meaning (analagous to formations like 'national', 'tribal', or 'organizational'), namely that of pertaining to, or characteristic of the structure and operations of society. In this sense justice clearly is a social phenomenon and the addition of 'social' to the noun a pleonasm [Footnote omitted] such as if we spoke of 'social language' -- though in occasional early uses it might have been intended to distinguish the generally prevailing views of justice from that held by particular persons and groups.⁹

This, however, cannot be what the proponents of social justice have in mind, for clearly they intend something more than simply ordinary justice.

What then? Well, in the passage just cited Hayek does suggest another meaning. As applied to justice social is a reminder that we must look beyond narrow self-interest, that the proper scope of justice is all of society and not just particular groups therein.

When it came into general use in the third quarter of the last century it was meant to convey an appeal to the still ruling classes to concern themselves more with the welfare of the much more numerous poor whose interests had not received adequate consideration. [Footnote omitted] The 'social

question' was posed as an appeal to the conscience of the upper classes to recognize their responsibility for the welfare of the neglected sections of society whose voices had till then carried little weight in the councils of governments. 10

But this meaning too is inadequate to encompass the full scope of what is intended by the proponents of social justice.

Their concern is not simply to be aware of and to give equal consideration to the interests of all members of society. Rather, they argue that society itself should in some way become responsible for the interests of all of its members.

[T]he conception gradually came to mean that 'society' ought to hold itself responsible for the particular material position of all its members, and for assuring that each received what was 'due' to him. It implied that the process of society should be deliberately directed to particular results and, by personifying society, represented it as a subject endowed with a conscious mind, capable of being guided in its operation by moral principles. [Footnote omitted] 11

However, Hayek continues, though this new meaning of "social" gives the word a far broader scope than it originally had, it also makes its meaning so vague as to be of no help in pinning down the concept of social justice.

Indeed, it has produced a situation in which 'social' can be used to describe almost any action as publicly desirable and has at the same time the effect of depriving any terms with which it is combined of clear meaning. 12

Hence, we must try some other approach if we hope to determine the meaning of social justice.

Social justice is sometimes described as synonymous with the general welfare, the common welfare, the common good, and similar such like terms. To the extent that most people would accept the general welfare as a worthwhile goal towards which to strive, the equation of social justice with these concepts presents no problem. However, it takes little thought to realize that the general welfare is as amorphous a concept as social justice itself.

The common welfare or the public good has to the present time remained a concept most recalcitrant to any precise definition and therefore capable of being given almost any content suggested by the interests of the ruling group. [Footnote omitted] 13

The core problem with the general welfare, Hayek suggests, is that there is a tendency to identify the concept with some sort of sum-total of individual ends or satisfactions. Such identification, however, presents an insoluble problem, for there is no way to determine any such sum-total.¹⁴ For one thing, there is the purely pragmatic problem that it is impossible to ever know all the different ends and satisfactions.

The fact, however, is that in a Great Society in which the individuals are free to use their own knowledge for their own purposes, the general welfare at which a government ought to aim cannot consist of the sum of particular satisfactions of the several individuals for the simple reason that neither those nor all the circumstances determining them can be known to government or anybody else.¹⁵

But aside from the difficulty (impossibility) of identification, there are some even more serious problems with this notion of the general welfare. To attempt to satisfy all individual interests is a quixotic task, for it is neither possible, nor desirable, to satisfy all such interests. It is not

possible because individual interest will inevitably conflict. It is not desirable because clearly it is not in the common interest (however amorphous that term may be) to satisfy all individual interests. The justification for this latter conclusion is twofold. First, some interests will by their very nature be contrary to the common interest.. Second,

The order of the Great Society does rest and must rest on constant undesigned frustrations of some efforts -- efforts which ought not to have been made but in free men can only be discouraged by failure. The interests of some individuals will always be that some changes in the structure of society made necessary by changes in circumstances to which in the general interest that structure ought to adopt itself, should not be allowed to take place.¹⁶

Consequently, inasmuch as not all individual interests can be satisfied, we find that, in order to define the general welfare in terms of individual interests, we must pick and choose between competing interests. But how is such a decision to be made? Of course it is totally unrealistic to expect such selection could be made by mutual agreement.¹⁷ How then is it to be made?

It might be thought that the way to proceed is to balance the competing interests one against the other. But this approach is fraught with peril. Given the limits of human reason -- recall Hayek's distinction between critical and constructive rationalism -- we cannot hope to foresee all of the consequences of choosing one set of interests over another. Thus, to engage in a weighing process is to sacrifice the foreseeable to the unforeseeable.

Nor can the choice of the appropriate set of rules [i.e. for selecting between interests] be guided by balancing for each of the alternative

sets of rules considered the particular predictable favorable effects against the particular predictable unfavorable effects, and then selecting the set of rules for which the positive net result is greatest; for most the effects on particular persons of adopting one set of rules rather than another are not predictable. 18

Thus, a balancing of interests is not a viable solution to our problem.

Another possible solution is closely related to that just considered. We could simply choose between competing interests on the basis of majority opinion. However, the mere fact that something is desired by a majority in and of itself makes it neither just nor desirable, for the many are as likely as the few to err under the delusion of self-interest. 19 Hence,

[I]t would obviously be a perversion of that ideal [i.e. justice] if we were to define the general interest as whatever the majority desires. 20

Now, there is one way in which we could deal with particular interests which at first glance seems to avoid the problem of conflict between them. There are certain interests which can be thought of as genuine collective interests.

There are many kinds of services which men desire but which, because if they are provided they cannot be confined to those prepared to pay for them, can be supplied only if the means are raised by compulsion. Once an apparatus for coercion exists, and particularly if this apparatus is given the monopoly of coercion, it is obvious that it will also be entrusted with supplying the means for the provision of such 'collective goods', as the economists call those services which can be rendered only to all the members of various groups. 21

Instances of such collective goods would be roads and sanitation facilities.

However, the difficulty with relying on such collective goods to define the general welfare is that they too are hard to identify. Such things as roads and sanitation facilities may seem obviously to be collective goods. And yet, to say this is to rest upon some form of consensus agreement. What if such agreement is lacking, then how are we to determine collective goods. Hayek's own thought on this issue is not especially clear. He argues that collective goods can be determined by some sort of principle of reciprocity, a give and take between collective goods.

A collective interest will become a general interest only in so far as all find that the satisfaction of the collective interest of particular groups on the basis of some principle of reciprocity will mean for them a gain in excess of the burden they will have to bear.²²

But this principle is so vaguely sketched as to be of limited practical use. Moreover, in any event it seems fair to say that the number of interests which could legitimately be identified as collective goods will be exceedingly small. That being the case, it is most unlikely that those who equate social justice with the common welfare are limiting themselves to the notion of collective goods.

And so we return again to the question. how are we to determine what selection of individual interests constitutes the general welfare. The answer, says Hayek, is that we are not. Quite simply, the general welfare does not consist of any particular substantive content. It is instead a procedural concept. Thus, while it is not feasible to expect individuals to agree on the relative importance of their particular interests, it is feasible for

individuals to agree on a process or order which will provide optimum opportunity for each to satisfy his particular interests.

Indeed, the possibility of extending an order of peace, beyond the small group which could agree on particular ends, to the members of the Great Society who could not agree on them, is due to the discovery of a method of collaboration which requires agreement only on means and not on ends. 23

This, and nothing else, is what the general welfare is. It is the formation of an order which gives each individual an equal opportunity to satisfy his particular interests.

In this sense the general welfare which the rules of individual conduct serve consists of what we have already seen to be the purpose of the rules of law, namely that abstract order of the whole which does not aim at the achievement of known particular results but is preserved as a means for assisting in the pursuit of a great variety of individual purposes. 24

But, as must be obvious, this definition of the general welfare is essentially synonymous with Hayek's view of society as a cosmos or spontaneous order.

If, therefore, the general welfare is synonymous with social justice, then society as Hayek understands it to function is already manifesting social justice. But this cannot be what the proponents of social justice intend, for it is within such a society that the supposed social injustices by which they are disturbed occur. That being the case, it will not do to understand social justice as being the general welfare. And so, we must seek for some other meaning of the concept.

It is thought by some that social justice is defined by the notion of equality.

The most common attempts to give meaning to the concept of 'social justice' resort to egalitarian considerations and argue that every departure from equality of material benefits enjoyed has to be justified by some recognizable common interest which these differences serve. [Footnote omitted] 25

However, while the idea of equality of material position, also referred to as equality of result, does seem to be primary in this context, there are two other notions of equality which must also be noted. One is equality of treatment, the other is equality of opportunity.

Equality of treatment is important here because it significantly affects Hayek's reaction to equality of result. Now, equality of treatment may sound as if it is quite similar to Hayek's first sense of justice, viz. "the principle of treating all under the same rules." 26 In fact, Hayek considers the two notions not just similar, but identical. That is, he maintains that to apply the same rules to everyone is to treat everyone equally. Conversely, if we do not apply the same rule to everyone, then we are not treating everyone equally. It is, of course, debatable whether this identification is valid. However, the fact remains that Hayek does make this identification.

The importance of this identification is that it means for Hayek equality of result is not achievable without violating the principle of justice. Given the differences in people's aptitudes and zeals, given the altogether unforeseeable role of chance in this world, it is not possible to put different individuals in the same material position, while at the same time applying the same rules to all.

The great problem is whether this new demand for equality does not conflict with the equality of the rules of conduct which

government must enforce on all in a free society. There is, of course, a great difference between government treating all citizens according to the same rules in all the activities it undertakes for other purposes, and government doing what is required in order to place the different citizens in equal (or less unequal) material positions. Indeed, there may arise a sharp conflict between these two aims. Since people will differ in many attributes which government cannot alter, to secure for them the same material position would require that government treat them very differently. ... Strict equality of those benefits which government could provide for all, on the other hand, would clearly lead to inequality of the material positions.²⁷

Thus, if social justice is equated with equality of material position, we are forced to choose between justice and social justice. For Hayek there is no doubt which is the correct choice to make.

There is, in addition, one further difficulty with equating social justice and equality of material position. That is that so long as government is not responsible for the particular material position of each individual, those inequalities which do occur cannot reasonably be ascribed to anyone's intention, but can instead be shrugged off and attributed to fate or chance or the like. However, if, in the cause of social justice, government becomes responsible for determining the material position of each citizen, then such inequalities as do occur will now clearly be the result of deliberate action.

In assigning people to their different tasks, the central planning authority would have to be guided by considerations of efficiency and expediency and not by principles of justice or equality. No less than in the market order would the individuals in the common interest have to submit to great

inequalities -- only these inequalities would be determined not by the interaction of individual skills in an impersonal process, but by the uncontradictable decision of authority.²⁸

Although not expressed in so many words, it seems clear that Hayek thinks it best that no one, individual or group, have such extensive power to determine the status of others, for such would be a serious threat to individual freedom. To put it another way, equality of result can only be attained through equality of submission.

Full equality for most cannot but mean the equal submission of the great masses under the command of some elite who manages their affairs. While an equality of rights under a limited government is possible and an essential condition of individual freedom, a claim for equality of material position can be met only by a government with totalitarian powers. [Footnote omitted]²⁹

There remains for consideration the notion of equality of opportunity.

The demand for equality of opportunity or equal starting conditions (Startgerechtigkeit) appeals to, and has been supported by, many who in general favor the free market order.³⁰

In principle there can be no objection to striving for equality of opportunity. The difficulty rather is one of pragmatic application. Certainly as to those benefits which are within government control there should be equal opportunity of access for all.

So far as this refers to facilities and opportunities as are of necessity affected by governmental decisions (such as appointments to public office and the like), the demand [i.e. for equality of opportunity] was indeed one of the central points of classical liberalism ... ³¹

But this would not produce equality of opportunity.

This is so because in a spontaneous order the number of "facilities and opportunities" which are, or could be, brought within the control of the government are exceedingly few when compared with the pertinent aspects which are beyond governmental control. If, therefore, the demand for equality of opportunity is taken in its most literal sense, this demand, like that for equality of result, becomes a demand to drastically extend the powers of government.

But all this would still be very far from creating real equality of opportunity, even for persons possessing the same abilities. To achieve this government would have to control the whole physical and human environment of all persons, and have to endeavor to provide at least equivalent chances for each. ... This would have to go on until government literally controlled every circumstance which could affect any person's well-being.³²

Yet even were we to go this path, we could never truly produce equality of opportunity, for we could never hope to control all the relevant variables. Thus, Hayek concludes that literal equality of opportunity is a "wholly illusory ideal, and any attempt concretely to realize it apt to produce a nightmare."³³

Let us now turn to what is probably the most commonly recognized synonym for social justice: distributive justice.

But the sense in which it is now generally used and constantly appealed to in public discussion, and in which it will be examined in this chapter, is essentially the same as that in which the expression 'distributive justice' had long been employed.³⁴

The meaning of distributive justice can, of course, be expressed in the old maxim: "tribuere suum cuique." But this tells us very little. Similarly we can accept

Hayek's view that the aim of distributive (social) justice is the same as that of classical socialism: namely to bring about a just distribution of wealth.³⁵ But we have not yet advanced very far, for the crucial question which still faces us is what is a just distribution of wealth. That is the question which we must answer if we are to understand what it is that the proponents of social justice are seeking.

Now, there are several different standards against which it might be argued that a just distribution of wealth (or material benefits in general) could be determined. Interestingly, Hayek does not, to my knowledge, consider one of the most basic standards: i.e. distribution according to need. That is, it can be argued that justice requires that the material benefits in any society should go to those who need them most.³⁶ However, despite the extent of his discussion of social justice, Hayek never confronts this possibility.

Another standard by which a just distribution of material benefits could be determined is that of distribution according to merit. However, as we saw in considering Hayek's theory of justice, there are two insurmountable obstacles to any attempt to reward according to merit. The first is that in most cases it will be quite difficult, if not altogether impossible, to assess the merit of the individual or individuals involved. Given the limits of human reason, we can never hope to know more than a small fraction of the factors which are relevant to assessing merit in any situation.

The second obstacle which thwarts any attempt to distribute material benefits according to merit is that there is no single, universally (or even generally) accepted standard against which to assess merit. In order to reward according to merit, we must be in agreement as to what constitutes merit. But, there are likely to be as many different opinions on what

constitutes merit as there are opinion holders. How then can we use merit as a standard against which to assess a just distribution? The answer, of course, is that we cannot. In the words of David Hume which Hayek cites:

So great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct could ever follow from it.³⁷

If then social justice is deemed synonymous with distribution according to merit, we must agree with Hayek that it is a meaningless concept. Unless, that is, we allow the standard to be set by either a central authority or majority opinion. But there are grave drawbacks to accepting either of these procedures, as we shall see shortly.

Distribution according to merit is not the only standard against which a just distribution could be assessed. Another standard which is often put forward is that distribution should be in accord with the value of the service in question to society. Since our concern is with social justice, it would seem that value to society should be a determinative factor in assessing reward. There is, though, one difficulty with this reasoning.

But though the conception of 'value to society' is sometimes carelessly used even by economists there is strictly no such thing... . Services can have value only to particular people (or an organization), and any particular service will have very different values for different members of the same society.³⁸

Moreover, not only is there no notion of value to society as a whole, but the only notion of value which we do have -- i.e. to particular individuals -- does not lend itself to interpersonal comparisons.

The point is not that the true values are different, but that the values attached to the different services by different groups of people are incommensurable.³⁹

There is, therefore, no way to assess the value of any service on anything other than an individual basis. But, if that is the case, what standard do we use to judge the value of any service? Whose assessment of value is determinative?

Two possibilities come to mind. First, we could have a standard of value set by some central authority. Undoubtedly this would provide a definite standard against which to measure the justice of the distributions of material benefits. But consider the disadvantages of such a system. It would be

to treat society not as a spontaneous order of free men but as an organization whose members are all made to serve a single hierarchy of ends. This would necessarily be a totalitarian system in which personal freedom would be absent.⁴⁰

Obviously, for Hayek this is not a desirable way to proceed.

The other possible way to produce a standard of value to society would be to allow the values of the majority to be determinative. This however, would be little different from a standard set by a central authority. In fact, in one way it might be worse. A central authority could at least be expected to make a reasoned choice between different activities. Majority opinion, on the other hand, is much more likely to be guided by emotional prejudices.

The consideration of the different attitudes which different groups will take to the remuneration of different services incidentally also show that the large numbers by no means grudge all the incomes higher than theirs, but generally only those earned by activities

the functions of which they do not understand or which they even regard as harmful. ... It is where most people do not comprehend the usefulness of an activity, and frequently because they erroneously regard it as harmful ... that the outcry about the injustice of it arises. ⁴¹

Thus, for Hayek there is no acceptable way to determine a standard of value to society. And so, this concept too fails to imbue social justice with any determinative meaning.

To this point we have been concerned with attempts by Hayek to deduce the meaning of social justice from other concepts put forward as synonymous thereto. However, at one point he proceeds in his search in a manner that is inductive. That is, he considers two situations which are supposed to present problems of social justice and endeavors to draw therefrom the meaning of the concept.

The first of these situations involves the fact that "the most unpleasant jobs are commonly also the worst paid."⁴² This is frequently thought to be an illustration of social injustice. Now, what does this tell us about social justice? Nothing, says Hayek, for there is no problem of justice in this situation. Had someone assigned particular individuals to these unpleasant low-paying jobs, then we could ask why these individuals and not some others. But in a free society no one is assigned to any particular job. As to the seeming disparity between the nature of the work and the remuneration therefor, this is simply another way of arguing that remuneration should be based on value to society. However, as we have seen, there is no concept of value to society. The person querying the supposed disparity may value the service in question higher than the person paying for the service. But there are no grounds for concluding that his valuation is right (just) and the other's

valuation wrong (unjust). Thus, to repeat, there is simply no problem of justice in this situation.

The other situation that Hayek considers is "the idea that people are to be protected against an unmerited descent from the material position to which they have become accustomed."⁴³ Here too he sees no problem of justice. The key is that in a spontaneous order remuneration is neither a reward nor a punishment. Rather, it is simply a signal of what activities should be continued and what activities should be discontinued. Admittedly, it may be unfair that one person prosper and another fail as the result of factors of which neither of them could reasonably have been aware. But this is neither just nor unjust.

The sense of injury which people feel when an accustomed income is reduced or altogether lost is largely the result of a belief that they have morally deserved that income and that, therefore, so long as they work as industriously and honestly as they did before, they are in justice entitled to the continuance of that income. But the idea that we have morally deserved what we have honestly earned in the past is largely an illusion. What is true is only that it would have been unjust if anybody had taken from us what we have in fact acquired while observing the rules of the game.⁴⁴

Thus, both gain and loss are part of the game, and neither gives rise to a claim of injustice.

Moreover, not only is there no legitimate ground for protecting an individual against unmerited loss, but to do so would itself be unjust. To protect an individual against unmerited loss would be to freeze the status quo and thereby to deprive other individuals of the opportunity to better their own position.

The satisfaction of such claims by particular groups would thus not be just but eminently unjust, because it would involve the denial to some of the chances to which those who make this claim owe their position. ⁴⁵

And so it is that neither of these situations of supposed social injustice is in fact able to shed any light on the meaning of social justice.

It should be noted in passing that, while Hayek has no sympathy for the claim that people should be protected against unmerited descent in their material position, he does not object to the provision of a minimum level of subsistence for all members of a society. Whether he considers this a matter of justice, charity, or even self-interest is not clear. But he does not object thereto. ⁴⁶

There is yet one additional way by which the concept of social justice might be given some meaning. It will be recalled that in Hayek's theory of justice the key concept was injustice and that justice was an ideal towards which we moved by identifying and eliminating injustice. Now, cannot a similar arrangement hold with social justice? That is, can we not approach social justice by identifying and eliminating social injustice when we find it?

There can be no test by which we discover what is 'socially unjust' because there is no subject by which such an injustice can be committed, and there are no rules of individual conduct the observance of which in the market order would secure to the individuals and groups the position which as such (as distinguished from the procedure by which it is determined) would appear just to us.
[Footnote omitted] ⁴⁷

No, for Hayek there can be no negative test of social injustice.

There is one final issue relating to the meaning of social justice which remains to be discussed.

The question comes to mind, if social justice is as meaningless as Hayek contends, how do you explain its popularity? Or, putting the shoe on the other foot, we might wonder whether examining the reasons for the popularity of social justice might be of use in determining its meaning.

Three different reasons for the popularity of social justice are offered by Hayek. The first we have already mentioned at the beginning of this section. That is, as we observe the world around us we are constantly struck by instances of unfair treatment. But as we have already noted, there is a difference between unfairness and injustice. However, our tendency to anthropomorphize the world around us tends to blur this distinction. And so, we tend to describe as unjust situations which are not the result of human action and, hence, not a suitable object for a judgement of justice.

The second reason why thoughts of social justice are so popular is that they are an atavism, a throwback to the days of the small, tribal society.

There can be little doubt that the moral feelings which express themselves in the demand for 'social justice' derive from an attitude which in more primitive conditions the individual developed towards the fellow members of the small group to which he belonged.⁴⁸

In such a small group it was possible to know the abilities, merits, and needs of one's fellows. Further, given such knowledge, it was possible, and perhaps obligatory, to guide one's actions in accord with such knowledge. However, such awareness is not possible in the Great Society, and so our actions cannot take the same form as they would in a small society.

In the Great Society many of the effects of a person's actions on various fellows must be unknown to him. ... In particular, he will often not know who the

individual people will be who will benefit by what he does, and therefore not know whether he is satisfying a great need or adding to abundance. He cannot aim at just results if he does not know who will be affected. 49

In short, the demand for social justice is a futile attempt to apply the morality of a small society to the Great Society.

The final reason Hayek gives for the popularity of social justice is not at all favorable to the concept. Often, he says, claims for social justice are no more than disguised envy and self-interest. It "camouflages under the name of justice what has nothing to do with justice."⁵⁰ Thus, calls to redistribute income are often no more than envy at the good fortune of others. Similarly, claims to be protected against unmerited loss of benefits are frequently the espousal of self-interest against the legitimate interests of others. Hayek does not contend that all proponents of social justice are motivated by such base motives. But he does believe that this element is present.

With that we come to the end of the first part of this analysis.

C. Social Justice is Meaningless within a Spontaneous Order

In the previous section we were concerned with Hayek's efforts to determine the meaning of the concept of social justice. We saw there that, despite the various terms put forward in explanation thereof, he maintained that the concept had no single, definite meaning. The thrust of this aspect of his argument is obviously "how can you pursue social justice if you don't know what it is?"

In this section we will examine Hayek's attack on social justice in a different manner. Here, we will assume that social justice can be understood as distributive justice and that this concept presents a sufficiently definite goal at which to aim. However, notwithstanding this, Hayek argues that social justice is still meaningless. This is so because, if we examine what must be done to pursue the goal of social justice, we will see that it is not attainable within a society which constitutes a spontaneous order. Thus, to advocate social justice while society remains a spontaneous order is to engage in a meaningless activity.

Let us begin by granting arguendo that social justice and distributive justice are the same and that, viewed in this manner, social justice does present a determinate goal at which to aim, the goal being distribution of the material benefits of society according to some rational principle. Now, why is this a goal which is meaningless within a spontaneous order? The answer is actually quite simple. Distributive justice makes sense only if some human agency is distributing the material benefits of society. But, in a spontaneous order there is no distribution of such benefits. And, if there is no distribution, there is nothing against which to measure distributive justice.

That there is no distribution in a spontaneous order can be explained in several ways. First, notwithstanding efforts to personify society, society is not an entity capable of acting.

Society, once more, is not an acting person but an orderly structure of actions resulting from the observation of certain abstract rules by its members. We owe all the benefits we receive from the operation of this structure not to anyone's intention to confer them on us, but to the members of society generally obeying certain rules in the pursuit of their interests. ... 51

Thus, to say that society has been unjust in distributing material benefits is nonsense, for society does not, and is not capable of, distributing anything..

Even more decisive is the fact that in a spontaneous order not only does society not distribute material benefits, but no one does. Rather, in a spontaneous order the distributing agent -- if one must use that term -- is an impersonal process and not a human agent. There is no one who has been, or can be, just or unjust.

The general failure to see that in this connection we cannot meaningfully speak of the justice or injustice of the results is partly due to the misleading use of the term 'distribution' which inevitably suggests a personal distributing agent whose will or choice determines the relative positions of the different persons or groups. [Footnote omitted] There is of course no such agent, and we use an impersonal process to determine the allocation of benefits. ... 52

The confusion is furthered when we speak of the earnings in a spontaneous order as rewards or benefits. As we have already seen, this is not the function of earnings. They are not means to reward good actions, and their lack to punish bad actions. No, in a spontaneous order earnings are a signal by which efforts are channeled into or away from particular activities as the case may be.

But earnings in a market system, though people tend to regard them as rewards, do not serve such a function. Their rationale (if one may use this term for a role which was not designed but developed because it assisted human endeavor without people understanding how), is rather to indicate to people what they ought to do if the order is to be maintained on which they all rely. 53

And so, given all of this, social justice is indeed

meaningless in a spontaneous order, for if there is neither distributing agent, nor distribution, nor benefits, what grounds are there to speak of distributive justice.

However, it might be argued that the foregoing analysis is too simplistic, that it rests on sleight-of-hand involving the word "distribute". Perhaps social justice is not attainable with society in its present form. But could we not modify society slightly so as to retain its overall spontaneous nature while at the same time making social justice an attainable goal? No we could not, and to see this we need only to consider what would have to be done to attain social justice.

The aim of social justice as we have stated it is to secure that the distribution of material benefits in a society is in accord with some rational principle. Among the principles put forward to control the distribution are merit and value to society. Now, what does this aim entail?

First, there must be control of all remuneration. A central authority must be empowered to decide who gets what for doing what. Only in this way can there be any guarantee that distributions will be in accord with the controlling rational principle.

Of course, if the central authority is to distribute in accord with the rational principle, then it must also decide what is required by the principle. As we saw above, neither merit, nor value to society are susceptible to a single, uncontroversial meaning. Accordingly, the central authority must determine and enforce its own view of what is demanded by the applicable principle.

A further result of the central authority's controlling remuneration is that earnings will no longer be signal of what activities should and should not be pursued. That being the case, it will then become incumbent upon the central authority to determine what

activities are done and by whom. And this in turn will entail the setting of one single set of ends for all members of society. This, all of this, is what is required if we are to move towards the goal of social justice.

But if this is so, it takes little thought to see that the society which would take such form could hardly be called a spontaneous order. What is spontaneous about a society in which a single set of ends is set by government to everyone, in which a single set of values applies to everyone, in which each individual is told what he must do and when? What is spontaneous about a society in which individuals can no longer guide their lives by their own knowledge and their own values and goals? The answer is nothing. Such a society is not spontaneous, but is instead a taxis, a deliberately directed society.

In other words, if 'social justice' is to be brought about, the individuals must be required to obey not merely general rules but specific demands directed to them only. The type of social order in which individuals are directed to serve a single system of ends is the organization and not the spontaneous order of the market, that is, not a system in which the individual is free because bound only by general rules of just conduct, but a system in which all are subject to specific directions by authority. 54

Quite simply, we have a choice: Justice and a spontaneous order, or social justice and an organized, centrally controlled society. We can have one or the other, but not both.

D. The Dangers of Pursuing Social Justice

Let us now take the choice with which we ended the last section and turn it into a question. Grant that social justice is a desired goal -- for the nonce we will forget that its popularity can be explained at least in part by envy and self-interest. Now, if that is the case, should we not pursue social justice, even if we must transform society from a spontaneous order to a taxis in the process? Is it not right to do so, and are we not, perhaps, obligated to do so?

But the prior question is whether it is moral that men be subjected to the powers of direction that would have to be exercised in order that the benefits derived by the individuals could be meaningfully described as just or unjust. 55

As should be quite apparent by now, Hayek's answer to this question would be a very definite "No". To a large extent the reasons for his answer have already been clearly set forth in the prior chapters of this thesis. In particular, in Chapter One we discussed at some length his preference for and advocacy of cosmos over taxis. Those arguments will not be repeated here. However, at this point it is worth noting that Hayek opposes social justice on the grounds that to pursue it is to radically alter society as we know it and to threaten the existence of certain values which are basic to our way of life.

Unfortunately, this vague desire which has become one of the strongest bonds spurring people of good will to action, not only is bound to be disappointed. This would be sad enough. But, like most attempts to pursue an unattainable goal, the striving for it will also produce highly undesirable consequences,

and in particular lead to the destruction of the indispensable environment in which the traditional moral values alone can flourish, namely personal freedom.⁵⁶

The first is justice. As we have already seen, justice for Hayek involves "the principle of treating all under the same rules." To Hayek this is the same as treating everyone equally. Social Justice, however, is concerned not with the way people are treated, but rather with the results of that treatment. It aims to make the material position of each individual subject to some rational principle of distribution. There is, however, no possible set of general rules by means of which such just distributions could be achieved.

It appears sometimes to be imagined that a mere alteration of the rules of individual conduct could bring about the realization of 'social justice'. But there can be no set of such rules, no principle by which the individuals could so govern their conduct that in a Great Society the joint effect of their activities would be a distribution of benefits which could be described as materially just, or any other specific and intended allocation of advantages and disadvantages among particular people or groups. ⁵⁷

Social justice can, therefore, be pursued only by treating people differently. For that reason, it is incompatible with Hayek's principle of justice. And for Hayek it is enough merely to point out this conflict to show that social justice must not be pursued.

Social justice is also a clear and present danger to personal (individual) freedom. And, personal freedom is a value which is at the foundation of Hayek's entire philosophy. The threat arises because, as was seen in the last section, social justice is meaningful only in a society which is rigidly controlled by a central authority. It is incompatible with any society in which individuals are free to use

their own knowledge for their own purposes.

For in such a system in which each is allowed to use his knowledge for his own purposes [Footnote omitted] the concept of 'social justice' is necessarily empty and meaningless, because in it nobody's will can determine the relative incomes of the different people, or prevent that they be partly dependent on accident. 'Social justice' can be given a meaning only in a directed or 'command' economy (such as an army) in which the individuals are ordered what to do; and any particular conception of 'social justice' could be realized only in such a centrally directed system. It presupposes that people are guided by specific directions and not by rules of just individual conduct. Indeed, no system of rules of just individual conduct, and therefore no free action of the individuals, could produce results satisfying any principle of distributive justice. 58

Thus, Hayek would argue that social justice is as incompatible with personal freedom as it is with justice.

Concomitant with this threat to personal freedom is a threat to personal responsibility, for responsibility goes hand-in-hand with freedom. The goal of social justice is to make each individual's material position coherent with some rational principle. This, in turn, means that the individual's position must be made subject to the control of a central authority. Now, the effect of this will be to remove an individual's fate from his own control and place it largely in the hands of the central authority. And thus, it will be the central authority and not the individual which is responsible for the individual's fate.

Finally, the combined effect of the loss of personal freedom and responsibility, as well as the stress on equality, will be felt most acutely in the field of morality, for our basic notion of morality

is dependent on these other values.

[T]he demand that we should equally esteem all our fellow men is irreconcilable with the fact that our whole moral code rests on the approval or disapproval of the conduct of others; ... similarly the traditional postulate that each capable adult is primarily responsible for his own and his dependent's welfare, meaning that he must not through his own fault become a charge to his friends or fellows, is incompatible with the idea that 'society' or government owes each person an appropriate income. ... Though all these moral principles have also been seriously weakened by some pseudo-scientific fashions of our time which tend to destroy all morals -- and with them the basis of individual freedom -- the ubiquitous dependence on other people's power, which the enforcement of any image of social justice creates, inevitably destroys that freedom of personal decisions on which all morals must rest. [Footnote omitted]59

In sum, for Hayek to pursue social justice is to sacrifice justice, personal freedom, and responsibility, and ultimately our basic notion of morality. Surely, he says, social justice is not worth this price.

CHAPTER SEVEN

PROBLEMS WITH THE IDEA OF A SPONTANEOUS ORDER

As we have just seen in the preceding chapter, Hayek's criticism of the mirage of social justice is very much related to his advocacy of society as a spontaneous order or cosmos. The essence of the relationship between the two is that social justice, as Hayek understands the concept, is not attainable or even pursuable within the framework of a spontaneous order. Rather, social justice has meaning only within a directed order or taxis. In that the preservation of the spontaneous order is for Hayek a matter beyond dispute, the pursuit of social justice must for that reason be abandoned.

In a later chapter we will consider whether the pursuit of social justice is as totally incompatible with a spontaneous order as Hayek maintains. Here, however, our concern is a different one. It is to see whether the very idea of a spontaneous social order is meaningful and viable. Should the idea of a spontaneous order prove unstable for reasons independent of those connected with the pursuit of social justice, then the impact of Hayek's critique of social justice, to the extent that it is based on alleged incompatibility with the spontaneous order, will be seriously lessened. If the spontaneous order cannot stand on its own terms, then it is not terribly

important that the pursuit of social justice further weakens that idea.

A. Critical v. Constructive Rationalism

The foundation of Hayek's advocacy of the spontaneous order is as we have seen his epistemology. And at the heart of that epistemology is the distinction between critical and constructive rationalism. The latter maintains both that no belief is justified if it cannot be rationally justified, and that what men can achieve by considered and applied use of reason is extensive. This form of rationalism Hayek rejects as sadly mistaken. He espouses instead critical rationalism which maintains that there are very definite limits indeed to what can be achieved through the use of reason. These limits are a result of our inevitable ignorance as to most of the facts which are pertinent to any course of action.

The implication of this for the social order is that it is naive to believe that our social orders are the result of deliberate human action. Given the limitations of critical rationalism, and given the complexities of our social orders, it simply cannot be that the latter were deliberately designed. The knowledge required for such a task would be far beyond that which critical rationalism would admit to be possible. But if our social orders were not deliberately designed, then the only feasible explanation for their origin is spontaneous or evolutionary development. Likewise, the limitations of critical rationalism preclude us from attempting to deliberately develop our social orders in the future. Here too we will be able to know at best only a fraction of the facts which will be relevant to any

course of action that we may consider. Moreover, since the original development of the social order was spontaneous rather than deliberate, we cannot adequately gauge the value of any particular existing institution, for we cannot know for what reason it evolved. Thus, any attempt to tamper with existing institutions may have untoward consequences. All things considered, it is best then to let future development carry on in the same vein as in the past. That is, what originated as a spontaneous order should be allowed to continue to develop as a spontaneous order.

Stated this way, Hayek's advocacy of the spontaneous order seems to make sense. But does it really? Consider, what would happen to this argument if the distinction he draws between critical and constructive rationalism could not be maintained? And that is exactly where I want to begin the substance of this chapter, with the contention that in practice the distinction between critical and constructive rationalism is not terribly precise, and thus not terribly meaningful.

Our analysis must begin by noting that there are really two separate ideas involved in the contrast between critical and constructive rationalism. One is the idea that nothing should be taken for granted, that everything must be rationally justified before it can be accepted. The other is the idea that there are very strict limits beyond which we cannot see when we attempt to plot our future course of action, and these limits must not be exceeded. Each of these ideas must be examined when we are considering the cogency of the distinction between critical and constructive rationalism.

Let us consider first the demand for justification. It must now be recognized as beyond any doubt that in any argument there comes a point at which no further justification is possible. Put succinctly,

ultimate values cannot be justified. And any argument must, if pushed far enough, come to rest upon an ultimate value. This, of course, is not to say that justification will always be pushed to this extreme. But it could be. To this extent, then, it seems to me that Hayek is on solid ground in rejecting the idea that no position should be maintained unless it can be rationally justified. If this were the case, then no position at all could ever be maintained.

However, that is an extreme view. There is a more moderate position which must also be considered. That is the idea that when 'fairly challenged' a position must be supported with some justification. To understand this, let us begin by considering the standing of the status quo. Perelman argues, and in this I am in agreement with him, that it is rational to treat the status quo as needing no justification. Thus, he speaks of

a tendency, natural to the human mind, to regard as normal and rational, and so as requiring no supplementary justification, a course of behaviour in conformity with precedent. ¹

To hold the contrary position would be to envision a life entirely consumed with attempts at justification. If everything had to be justified, there would be no time to engage in anything except the process of justification, which presumably would itself have to be justified.

But that is not the case. It is rational to accept the status quo, to take it for granted. It is the one who seeks to challenge the status quo who bears the initial burden of proof. To quote Perelman again, "Change only must be justified."² To this extent too, it seems that Hayek is right to reject constructive rationalism, if by that concept is meant a prima facie need to justify the status quo.

But it is with the next step that Hayek moves on to rather thin ice. Once the status quo is 'fairly challenged' by justifying a proposed change, it loses its prima facie immunity from the need to justify itself. It is then eminently rational to require that the proponent of the status quo come forward with some justification therefor.

Yes, there is considerable looseness in what I have just said. It will always be open to question whether a proposed change has been adequately justified, whatever adequately may mean. And it may even be that some changes will by their very nature be such that they can be disregarded, justified or not. But these are not matters with which we need here to be concerned. The fact is that Hayek does not appear to recognize any need to justify the status quo, no matter how it may have been challenged.

His stock response to any challenge to the status quo, at least in terms of the social order, is to fall back on the idea of spontaneous development. Because the order evolved rather than being deliberately developed, we can have no accurate idea of what function any particular aspect of it may be serving. And because we can not know the function of a particular institution, we cannot know what we will lose, what detrimental effects we will produce, if we change it. Therefore, the best policy is to keep hands off. The following is a good example of this form of argument.

Since the value of freedom rests on the opportunities it provides for unforeseen and unpredictable actions, we will rarely know what we lose through a particular restriction of freedom. Any such restriction, any coercion other than the enforcement of general rules, will aim at the achievement of some foreseeable particular result, but what is prevented by it will usually not be known. The direct effects of any interference with the market order will be near

and clearly visible in most cases, while the more indirect and remote effects will mostly be unknown and will therefore be disregarded. [Footnote omitted] We shall never be aware of all the costs of achieving particular results by such interference. 3

I find this argument most unpersuasive. The fact is, if we do not know what we lose by changing a particular institution neither do we know what we possess by retaining it. By contrast, the proposed change, if justified, at least attempts to show what is gained by making the change. Hayek's position thus becomes a reversal of the old adage. For him it is better to go with the devil we don't know than with that we do. To me such a conclusion is unacceptable.

If the status quo is to be maintained in the face of a proposed justified change, then it must be justified, it must be defended. It is not enough to simply refuse to recognize the legitimacy of the challenge. Rather that challenge must be rebutted, either by calling into question its own justification, and/or by providing a more persuasive justification for the status quo. This process will, of course, be a very murky one, involving that fine old notion of metaphorical weighing. No hard and fast standards can be set. And that is the crucial point.

Defense of the status quo cannot be explained in terms of any black-white distinction such as that Hayek seeks to draw between critical and constructive rationalism. It will of necessity depend upon the particulars of each context in which it arises. And once that is recognized, it follows that it is not any definition of rationality per se which requires that the institutions of the spontaneous order be maintained. Rather it will be the strength of the arguments which can be offered in each particular situation in which dispute arises. In a given

situation the spontaneous order may prevail. But rationality per se does not dictate that this will always be the case.

Now what of the other idea which is involved in Hayek's distinction between critical and constructive rationalism. Does it provide support for the advocacy of the spontaneous order? This second concern is the idea that there are very strict limits beyond which reason cannot go. In planning future developments we can see only a very short way, and further than we can see we should not attempt to go.

Here too there is a range within which the distinction Hayek draws makes some sense. But again, it is a narrow and not especially useful range. To support a course of action by means of an argument which purports to consider all possible consequences of that action does seem patently unreasonable. Likewise, an argument based on consequences foreseen to occur years in the future also seems unreasonable. If it is these sort of arguments which Hayek rejects under the name of constructive rationalism, then his position does seem defensible.

The difficulty is that the 'reasonings' just described again represent an extreme case. At least today, it is for the most part only in the context of utopian thought experiments that such far reaching consequences are considered. The value of such experiments is, of course, a matter for dispute. Hayek, for one, thinks them most unhelpful.

To talk about a society about which either the observer or any of its members knows all the particular facts is to talk about something wholly different from anything which has ever existed -- a society in which most of what we find in our society would not and could not exist and which, if it ever occurred, would possess properties we cannot even imagine. 4

On the other hand, William Galston devotes an entire chapter in Justice and the Human Good to "defending utopian theory as the most appropriate procedure for political philosophy."⁵ Be that as it may, the crucial fact is that it is not utopian thought experiments which Hayek is concerned to exclude with the critical-constructive rationalism dichotomy.

No, his concern is with arguments of a much more specific and practical application. It is with arguments which do not claim to foresee all consequences or even consequences at any future time long removed. Rather, they purport to do no more than take into account seemingly readily foreseeable factors which relate to the course of action under consideration.

So wherein lies the problem? It lies in determining what factors can be treated as readily foreseeable. It lies also in determining at what point one can reasonably disregard unforeseeable factors. That is, at what point can one say, I don't know precisely what effect this action will have in a given area, but that is something we can worry about when the time comes. And finally, it lies in knowing -- perhaps intuitively -- which factors need not be considered at all. Or, turning that about, it lies in knowing which factors must be considered.

Now, I have not yet given any examples of the sort of argument which raises this type of problem.. And, it is not my intent to do so. The fact of the matter is that virtually all reasoning about courses of action must ask the questions I have just posed. The real problem with such arguments is not whether they do or do not cross the line between legitimate (critical) and illegitimate (constructive) rationalism. Rather, it is precisely where that line is to be drawn in any given case. In effect, all Hayek's critical-constructive rationalism distinction does is

to tell us that we must draw a line. It does nothing to tell us where that line is to be drawn.

It is worth noting in this connection that when it comes to determining the range of reason's vision, we must keep in mind that the frontiers of human knowledge are continually being pushed back. Hayek disputes, or at least attempts to minimize the import of this argument.⁶ He does so by emphasizing the unknowability of the myriad of particular facts which may be relevant to any decision. But the fact remains, as he himself admits, that "science consists not of the knowledge of particular facts..."⁷ Rather, it is concerned with abstract patterns of behavior. And it is in recognizing and understanding these abstract patterns that human knowledge continues to grow. Thus, what was beyond the reaches of reason 100 or even 50 years ago, may today be considered within reason's ken. Examples abound. Consider, for instance the extent to which long range weather forecasts are now possible.

And the study of social orders is in no way excluded from the expanding sphere of knowledge. Yet Hayek would have us suppose just that. He would have it that our ability to understand our social orders is today no more expansive than it was 100, 500, or even 1000 years ago. This seems palpably untrue. It is one thing to say that we are far from understanding everything there is to know about a social order. It is quite another to say we know virtually nothing at all about it. In connection with the narrowness of Hayek's vision, it is worth noting here what Wiesław Lang has had to say about it.

Hayek's theory of knowledge, for example, completely ignores the dynamic acceleration of the social sciences in this century. Hayek gives a clear preference to traditional and irrational knowledge of social phenomena because this kind

of knowledge is much more suitable for the empirical underpinning of his concept of justice than modern theories of social structure, social change and social development. 8

The essential point of all this is that in determining where to draw the line between legitimate and illegitimate reasoning we must keep in mind that that line is dynamic and not static.

Does, then, Hayek make any attempt to tell us where this line is to be drawn? He does in a sense. But he does so only on an ad hoc basis. One might attempt to extrapolate some general principle from these particular examples. But in my opinion the closest one can get to such a principle is something along the lines of: keep your hands off, don't touch the spontaneous order at all. But even this is dubious as a general principle in light of Hayek's willingness to tinker with the spontaneous order whenever it suits his purposes. Witness the latter part of The Constitution of Liberty⁹ and the third volume of Law, Legislation and Liberty. Thus, it appears that Hayek thinks the social order should be left to its own wiles and designs (except where he holds otherwise). But surely this is the conclusion to which his theory of critical rationalism is supposed to lead. To treat it also as the touchstone of critical rationalism is to render his argument tautological.

It would appear, therefore, that Hayek's epistemology does not, in fact, support his prescriptive claims for the spontaneous order. But on the other hand, neither does it preclude those claims. In short, as far as his epistemology is concerned it may or may not be necessary that the spontaneous order remain essentially in its present form. But if that is a necessity, support for that claim must be found elsewhere than in Hayek's epistemology.

B. Spontaneous Development

Another way in which Hayek attempts to support his prescriptive claim for the spontaneous order is by the notion of spontaneous development. The essence of this notion is the idea of development by human action but not human design. That is, the institutions of a spontaneous order do not come about because someone has deliberately set out to produce them. This would be incompatible with Hayek's critical rationalism. Rather, what happens is that the institutions are the unintended and unforeseen result of a course of action undertaken for purposes often totally unconnected with the consequences which actually occur. It is when the consequences of a course of action prove conducive to the survival of the group which follows that course of action that the course of action becomes informally crystallized into an institution. As I have described it, the process of spontaneous development is rather vague and general. But that is in fact the tenor of Hayek's discussion. Interestingly, he does not once attempt a concrete illustration of the workings of this process.

In any event, let me repeat that the essence of this notion is that development is not the result of human design. Social institutions are not designed, they simply happen. From this Hayek draws the conclusion that what has been true in the past should remain true in the future, which is to say that we should avoid any attempt to design our social institutions and should instead allow them to continue to develop spontaneously. In short, we are presented with yet another aspect of Hayek's hands off attitude towards the social order.

Now, even if we accept Hayek's notion of spontaneous development at face value, there is one very major problem with the conclusion he draws as to the social order. The problem is this. Even with spontaneous development as Hayek pictures it the individual actor is almost inevitably trying to accomplish something. Only in the rare case, such as Charles Lamb's roast pig, will the consequences which result be totally divorced from any purpose whatsoever. More commonly the actor will be bent on accomplishing something. Of course, what he accomplishes may be quite different from what he intended. But he has, nonetheless, set out to accomplish something,

This is especially the case when we come to consider social and/or political institutions. It is difficult to accept that design played no part in the development of such institutions. This is not to say that they were designed, in that what resulted was what was intended from the first. It is, however, to suggest that often the institution resulted because someone set out to accomplish something in the social or political realm. What was accomplished may have in fact been quite different from what was intended. But this does not gainsay the fact that it was an intent or design which resulted in the institution. Had nothing been attempted, nothing would have resulted.

Herein lies the basis of my disagreement with Hayek. He would have it that social and political institutions should be left to look after themselves. Any attempt to alter them in accord with a pre-conceived design should be foregone in favor of simply letting them develop spontaneously. But absent any attempt to alter there can be no spontaneous development, for it is attempts to alter which constitute the grist for the mills of spontaneous development. As Hayek himself notes several times, a spontaneous order is the result of human action but not human design.

An 'action' totally devoid of purpose is not in fact an action. Thus, while a spontaneous order is not designed in the sense that the final product was what was envisioned and intended from the start, it does, nevertheless, result because something was envisioned and intended.

But with this the import of spontaneous development becomes rather different from what Hayek would have us believe. It is not required that we do nothing towards developing or changing the social order. Rather, what is required is that we do not unalterably and irrevocably lock ourselves into a preconceived plan of action. The best laid plans of mice and men may gang aft a-gley but in so doing the result may be more advantageous than what was intended. In short, advocacy of spontaneous development requires that we leave open our plans to the unforeseen, not that we have no plans at all.

There is also another problem with using the notion of spontaneous development to defend the continued maintenance of the spontaneous order. Even if we accept that the spontaneous order has resulted from a process of spontaneous development, that is that it has evolved rather than being deliberately constructed, what basis is there to assume that the spontaneous order is the final result of spontaneous development? If social orders have evolved to a spontaneous order, why cannot they continue to evolve? Why cannot they leave the spontaneous order behind and move on to some other form of social order?¹⁰

It is not an implausible suggestion that this is precisely what has happened. The spontaneous order came about because it proved conducive to the survival of groups which utilized that form of social order. But cannot the same thing now be said about taxis-like orders? Have not these too come about through a process of evolution (as distinct from revolution), at least in the case of Western societies?

Is it not the case that societies which attempted to exercise greater control over their social order found this to be beneficial and consequently continued to move in this direction? Certainly it seems at least arguable that the appearance of taxis-like orders in Western society has been a matter of gradual development rather than sudden imposition. And if that is the case then it is spontaneous development which has produced such orders.

Moreover, even if historically it is not true that the taxis-like orders with which Hayek is concerned are an evolutionary development, this does not preclude the fact that such orders could come about through spontaneous development. There is absolutely nothing in the process of spontaneous development as Hayek explicates it which would set any limitation on the movement or direction of movement of that process. Spontaneous development could result in taxis. It could, unless, that is, it is necessarily the case that a taxis-like order could never prove beneficial to the group which utilized it. But Hayek has made no such showing. The closest he comes to doing so is the argument that only a spontaneous order is compatible with critical rationalism. However, as was demonstrated above, the epistemological defense of the spontaneous order does not hold up.

Thus, the notion of spontaneous development, like Hayek's epistemology, proves indifferent between a spontaneous order and a taxis. The existence of either is compatible with a belief in the process of spontaneous development. That the arguments based on both epistemology and spontaneous development fail to support the prescriptive claim about the spontaneous order is significant. These two arguments have at least a semblance of being objective, that is value free. As we shall soon see, the other arguments upon which Hayek bases his defense of the spontaneous order can make no such claim.

C. Normative Justifications for the Spontaneous Order

The remaining arguments in support of the spontaneous order have one factor in common. They are each concerned with demonstrating that the spontaneous order is advantageous or beneficial. One such argument relies on the idea of success. The spontaneous order, or rather the rules which constitute it, has prevailed because it proved conducive to the success of the groups which adopted it.

These rules of conduct have thus not developed as the recognized conditions for the achievement of a known purpose, but have evolved because the groups who practised them were more successful and displaced others. 11

Granting this, the question which comes to mind is what is the test of success. And the answer to that question is quite clear. For Hayek success is equated with mere physical survival.

The reason why such rules will tend to develop is that the groups which happen to have adopted rules conducive to a more effective order of actions will tend to prevail over other groups with a less effective order. [Footnote omitted] The rules that will spread will be those governing the practice or customs existing in different groups which make some groups stronger than others. 12

Thus, one advantage of the spontaneous order is that it is conducive to the survival of the groups which have adopted it.

There are two points which can be made in response to this argument. The first is that survival is an after the fact explanation rather than

before the fact justification. That is, the rules which constitute the spontaneous order were not put into effect because it was known they would be conducive to survival. Rather, it is their continued observation which is explained in terms of their being conducive to survival. That being so, the idea of survival can give little guidance to our future course of action.

Only if a wholesale replacement of the spontaneous order were being contemplated would the idea of survival be of any value. In such a case it could be argued that, since the spontaneous order has been conducive to survival, it would be foolhardy to discard it altogether. However, this situation is not one which is commonly faced. As we have already seen, the primary problem with which Hayek is concerned is the gradual transformation of the spontaneous order into a taxis-like order. In such a situation the idea of survival actually works against Hayek. If the rules are changed gradually -- i.e. if the change is evolved -- then if they prevail it would seem that they have passed the test of survival.

Actually, I would not choose to push the argument that far myself. It seems to me that the real difficulty with using survival as a touchstone is that it is a very amorphous idea. This in two senses. First, there is the problem of knowing whether the time span with which you are concerned constitutes an adequate test period. Second, in most cases it will be virtually impossible to isolate the effects of any particular rule. When analyzing social institutions there are rarely control groups. This latter aspect is particularly applicable when it comes to assessing the spontaneous order. So long as change is gradual and piecemeal it seems difficult to preclude it by reference to the idea of survival.

The second point to be made in response to Hayek's argument would grant the test of survival as he sets it out, and then reply so what. Is mere survival of the group a sufficient test of the desirability of a particular type of social order? Are there not other standards by which a social order might be appraised, such as the style of life its members lead, or the values they espouse? Of course it is true that survival is a pre-requisite for the display of other values. But Hayek is not really talking about a choice between life and mass suicide. Rather, he is saying, that something has survived is a sufficient justification to warrant its continued existence. Moreover, even if one considers the extreme case, life or death, it is not always the case that life is chosen. Some may hold with Cervantes that "my honour is dearer to me than my life", or with the motto on the Italian coin "it is better to live one day as a lion than a hundred years as a sheep."

Let me make clear that it is not my intent to dispute the value Hayek attributes to mere survival. All I want to do is point out that it is quite possible to value other things more. In establishing survival as a justification for the spontaneous order, Hayek is making a normative judgement. For the person who disagrees with that normative judgement, that the spontaneous order has proved conducive to survival is no reason for holding that that order must be continued to be maintained.

Another benefit which Hayek ascribes to the spontaneous order is that it is conducive to progress. But, by progress he does not mean what is more commonly understood by that word. He does not mean movement towards some determinate goal. To couple this idea of progress with the spontaneous order would be quite inconsistent, given that a distinguishing trait of the spontaneous order is

that it is purpose-independent. No, his idea of progress is quite compatible with the idea of a purpose-independent social order.

It would be more correct to think of progress as a process of formation and modification of the human intellect, a process of adaptation and learning in which not only the possibilities known to us but also our values and desires continually change. ¹³

Progress is movement for movement's sake, for it is in the process of learning, and in the effects of having learned something new, that man enjoys the gift of his intelligence.¹⁴

The spontaneous order is to be preserved because it is conducive to this idea of progress.

The difficulty with this argument is that it seems to be rather circular if not outright tautological. Hayek's idea of progress seems quite patently to be drawn from his belief that a social order ought to be purpose-independent. It is not surprising, therefore, that the form of social order he espouses is compatible with his idea of progress. Of course, for those who espouse a more teleological view of society Hayek's idea of progress would be most unsatisfactory. For them the more common sense of progress, as movement towards a determinate goal, would be appropriate. And from that it would follow that the spontaneous order was not in fact conducive to progress. Thus, like the argument based on survival, the argument based on progress is, in fact, a normative argument. As such it does not persuade those who do not accept the normative premise upon which it rests.

The final argument on which Hayek bases his defense of the spontaneous order is its compatibility with individual liberty. Obviously this is a normative argument. But notwithstanding that, it seems to me to be the most important and most likely to persuade of his arguments. I say that

because, despite the fact that respect for individual liberty is a normative premise, it is a premise which finds considerable support in contemporary society, or at least contemporary Anglo-American society. Now at this point I do not intend to devote any time to the question of whether, and if so why, individual liberty should be respected. However, I will return to the question of the value of liberty in a subsequent chapter which will deal more directly with Hayek's critique of social justice.

For now, let us assume that respect for liberty is our goal and let us assume that we are in agreement as to what is meant by that concept. The question that leaves us with is whether or not the spontaneous order is compatible with respect for liberty, while a taxis-like order is not. To answer that question we must begin by noting that both respect for liberty and the spontaneous order (as distinct from a taxis) are relative concepts. An individual can have more or less liberty, but only in the most extreme situation -- and it is doubtful if even there -- will he have no liberty at all. Likewise, a social order can be more or less spontaneous; but even in the most totalitarian society there will be some room for spontaneous action, i.e. some area in which the individual can direct his actions in accord with his own goals.

Now, if we concentrate our attention on the extreme positions, then Hayek's argument does seem valid. That is, if we compare the ideal-type of a spontaneous order with a rigid and all-encompassing taxis, then it does seem fair to say that the former is compatible with respect for individual liberty while the latter is not. But to concentrate on the extremes is misleading. Hayek's target is not the imposed totalitarian society, rather it is the evolving welfare state.

And if we compare, say, contemporary Britain with the ideal-type of the spontaneous order then I do not think we can fairly say that the former does not respect liberty. It may very well be that there is less of liberty in Britain. (And even this may be moot, depending on what one understands by liberty.) But to say that there is less liberty is not to say that there is no respect for liberty at all. To see this, one need only compare Britain with the ideal-type taxis.

Once we recognize this, we no longer have an either-or situation. We no longer have: spontaneous order entails respect for liberty, while a taxis-like order does not. Both respect liberty. The difference between the two is that the taxis-like order also respects other values. And because these other values may not always be totally compatible with respect for liberty, a balance must be struck between them. In short, what we have is a priority problem.

Thus, Hayek's contention that only the spontaneous order is compatible with respect for liberty is, in effect, a claim that respect for liberty is entitled to priority over other values. And this is a point which cannot be glossed over. At the beginning of this section of discussion I noted that one merit of the argument based on liberty was that respect for liberty was a concept with considerable support. But to espouse respect for liberty is not necessarily to espouse it at the expense of all other values. And yet this is what Hayek does. It is, therefore, grossly misleading for him to argue that only the spontaneous order respects liberty. Taxis-like orders can and do respect liberty. They simply do not do so to the extent that Hayek thinks appropriate.

With that we complete our examination and critique of the arguments Hayek uses to support the continued maintenance of the spontaneous order. In

my opinion none of those arguments have proved to be conclusive. They do give varying degrees of support to the claim that the spontaneous order ought to be maintained. But at the end of the day the continued maintenance of the spontaneous order is a matter of judgment and not a matter of necessity.

D. Miscellaneous Thoughts Concerning the Spontaneous Order

Before concluding this chapter, there are two additional points relating to the spontaneous order which I would like to discuss just briefly. The first of these is the relation between the spontaneous order and the catallaxy. According to Hayek the catallaxy is one type of spontaneous order.

A catallaxy is thus the special kind of spontaneous order produced by the market through people acting within the rules of the law of property, tort and contract. 15

However, in discussing the spontaneous order Hayek's concern appears to be entirely with the catallaxy. To the extent we are ever able to picture what he understands by the spontaneous order, what we see is a catallaxy. Because of this, I find it virtually impossible to imagine what a spontaneous order would look like which was not a catallaxy. And yet Hayek's own words make clear that there must be non-catallaxy spontaneous orders.

This point becomes important in relation to the critique of social justice. As we have already seen, a significant part of Hayek's criticism of social justice is that it is incompatible with the spontaneous order. But in point of fact what his argument shows, if valid, is that the pursuit of social justice is

incompatible with a catallaxy. Now if in fact there are forms of spontaneous order other than the catallaxy -- and Hayek tells us that there are -- the critique of social justice, at least on its face, does not pertain to these other forms of order. Thus, even if social justice is incompatible with the catallaxy, Hayek has done nothing to show that it is incompatible with other types of spontaneous order. In other words, Hayek's critique of social justice may not carry him nearly so far as he seems to think.

The final question I wish to raise is whether or not the spontaneous order is now an outdated concept. Granting Hayek everything which he wishes to claim anent the spontaneous order, is it not the case that contemporary western societies have now become so large and so complex that they can no longer function as spontaneous orders. Hayek's response would, I imagine, be to point out that with the increased size it has become even less likely that anyone could ever have at his fingertips all of the pieces of information which are relevant to any decision. The beauty of the spontaneous order, he would say, lies in allowing those who have information to utilize it. With this I would not disagree.

However, it does seem to me that there are other considerations. As we have seen, the spontaneous order is able to function because there is agreement on basic values. Rules of just conduct find acceptance only because when articulated they strike a responsive chord with the unarticulated patterns of behaviour which guide us. The spontaneous order can be purpose-independent only because there is, in fact, agreement at a very deep level. The problem as I see it is that in the great societies of the west there is no longer agreement about basic values. (Or, if there is, that agreement is oriented towards collectivism rather than Hayek's individualism.) And absent such agreement, the spontaneous order is not viable.

As for the complexity of contemporary society, it produces an order rather different from the model with which Hayek was working. As was noted just above, Hayek defends the spontaneous order in terms of the catallaxy. And the catallaxy he appears to have in mind is one of individual entrepreneurs. It is at least arguable that a purpose-independent society is meaningful when the focus of concern is individuals pursuing their own interests. But the significance and value of individual goals loses considerable meaning when our focus shifts to a corporate-bureaucratic model. There we can no longer seriously talk about the goals of individuals. Rather, what we are dealing with is goals which one group determines for another much larger group. And with that we have rendered meaningless one of the primary aims of the spontaneous order: viz. to let individuals pursue their own goals in the way they think best. .

I do not intend to carry this argument any further, if for no other reason than that it draws me into an area far outwith the scope of this dissertation. What I have said is, I believe, sufficient to raise a question which others might pursue. The hypothesis I pose is that while the spontaneous order may once have been a desirable form of social order, it is no longer viable, and should, therefore, be abandoned.

To sum up this chapter, I think that to the extent Hayek's critique of social justice rests on its incompatibility with the spontaneous order, it is far from persuasive. The spontaneous order, viewed in the most favorable light, is far from stable. Hence, any threat posed to it by the pursuit of social justice is not terribly significant.

CHAPTER EIGHT

FURTHER THOUGHTS ON JUSTICE

Another very important aspect of Hayek's critique of the mirage of social justice is the alleged incompatibility between the pursuit of social justice and Hayek's conception of justice. The essence of that conception of justice can be epitomized as: applying universally a coherent system of rules of just conduct. By contrast Hayek maintains that the pursuit of social justice is not possible through the universal application of such a system of rules. Rather, it requires the use of the sort of specific directives which Hayek terms rules of organization.

The intent of this chapter is not to explore the alleged incompatibility between justice and social justice. That task will be taken up in the next chapter. The intent of this chapter is instead to critically analyze one aspect of Hayek's conception of justice which is very significant vis-a-vis the critique of social justice. It should be noted that the scope of this criticism will be quite limited. It is not the purpose of this chapter nor of this dissertation to give a comprehensive critique of Hayek's conception of justice. As the length of the chapter thereon indicates, Hayek's thoughts on justice, as well as the issues raised thereby, are involved and extensive. Any comprehensive analysis thereof would warrant a work in itself. However, the primary focus

of this dissertation remains the critique of social justice. Accordingly, this chapter will discuss only one aspect of justice which relates specifically to the critique of social justice.

A The Significance of Hayek's Objective Conception of Justice

Hayek takes great pride in the claim that he has succeeded in demonstrating the existence of an objective conception of justice in his social order. The key elements in this objective conception are three. First, rather than being a positive test of justice, what we have is a negative test of injustice. Second, the standard of justice is inter-personally valid, that is, it is not limited to those sharing any particular beliefs, moral or otherwise. Finally the standard of justice is non-volitional, it exists independent of the will of any particular person or group of persons. Although all three elements are important, the last is perhaps the most crucial.

This becomes apparent when we consider the reason why Hayek attached such importance to the claim of objectivity. Hayek sees his conception of justice as a rebuttal to the position of the Legal Positivists. That position can be succinctly stated in three steps. One, it is the law that determines what is and is not just. Two, what the law is is in turn determined by an act of will. Three, it follows that the law (and with it justice) is whatever those in authority want it to be. Thus, whereas traditional natural law theory holds that certain actions are just in and of themselves, legal positivism holds that both law and justice are the result of deliberate human action. Or, to

amend the phrase Hayek often uses, they are the result of human action and of human design.

It is to counter this claim that Hayek stresses the objectivity of his conception of justice. Rather than oppose positivism with the claims of natural law theory, Hayek posits a third view of justice. Under this objective conception justice is a matter of human action but not of human design; it is, in short, non-volitional. The significance of this position is that Hayek is able to maintain, contrary to the positivists, that it is justice which determines law, and that justice itself is not simply a matter of what we want it to be. Justice and therewith law is outwith the realm of the will. Such a conception of justice gives genuine substance to the ideal of a government of laws and not men. In turn, the realization of this ideal is crucial for a society which seeks to protect and nourish individual liberty. And Hayek, as we have seen, is a staunch advocate of individual liberty.

Viewed in this light, the thrust of Hayek's objection to social justice becomes even clearer. In that the pursuit of social justice is incompatible with justice, by pursuing it we abandon the only objective (non-volitional) standard we have by which to evaluate the rules of our society. By abandoning that objective conception of justice, we forego the ability to judge our laws in terms of justice. Having done that, we have little alternative but to agree with the Legal Positivists that justice is determined by law and ultimately by will. And to take that road is to strike a serious blow against the cause of individual liberty. Or so Hayek would argue.

In this chapter I will look more carefully at Hayek's claim that he has demonstrated a conception of justice which is objective, especially in that it is non-volitional. Now the key to this claim of non-volitionality lies in the nature of the rules of just conduct, the rules of just conduct being at the heart

of Hayek's conception of justice. To summarize very briefly, those rules are non-volitional in that 1) they arise spontaneously, 2) they rest upon the general agreement of the populace, and 3) their development and articulation is a matter of reason and not will. In my analysis I will concentrate on the last two of these elements: I will attempt to show that volition may play a greater role in both the idea of agreement and in the nomos process than Hayek appears to suggest.

B. The Idea of Agreement in the Rules of Just Conduct

As we have seen in an earlier chapter, the rules of just conduct are patterns of behaviour which arise spontaneously rather than by being specifically laid down by some individual or group of individuals. They are initially observed in practice without at the same time being consciously followed. However, once they are articulated by a judge or other legal expert (the nomos process) that articulation is accepted because, and if, it reflects the pattern or practice of behaviour which had hitherto been observed. Thus, it is the judge's task to tell those involved

what ought to have guided their expectations, not because anyone had told them before that this was the applicable rule, but because this was the established custom which they ought to have known. 11

This acceptance of a spontaneously generated pattern of behaviour, initially unconsciously and only later consciously, is what I am designating by the term "agreement".

The idea of agreement is indispensably crucial to Hayek's claim to have provided an objective conception of justice. It is the basis for the claim that the rules of justice are non-volitional. Agreement is what allows Hayek to maintain that the rules of just conduct are neither posited by authority nor inherent in the nature of things, but rather are the result of human action though not of human design. If agreement does not exist, then neither does the objective conception of justice.

In this section I wish to suggest that there are a number of problems with the idea of agreement. The problems do not take the form of internal inconsistencies. Rather, they represent significant gaps in what Hayek says about agreement. Hence, it is not that the structure Hayek depicts is patently unstable, it is only that it is incomplete. My discussion of agreement revolves around three broad topics: what is meant by agreement, how do you determine agreement, and difficulties inherent in the idea of agreement. And it is to the first of those topics to which I now turn.

It is all very well to say that the rules of just conduct rest upon an underlying agreement. But precisely what does it mean to say that there is agreement? Yes, it means that the pattern of behaviour in question has been observed in practice. But observed by whom, or rather by how many?

One possibility would be unanimity. That is to say, the pattern of behaviour in question is accepted by all the members of the society. However, it takes little thought to decide that this cannot be what Hayek intends. The chances of unanimity among a group of anything other than the smallest size are virtually nil. If unanimity were what was required to establish rules of just conduct, there would be very few such rules, if any at all.

What then of the idea of a simple majority? A pattern of behaviour is accepted as a rule of just

conduct whenever the majority of the people in a society so treat it. While this possibility is not subject to the same charge of impracticality as the requirement of unanimity, it is impractical in ways of its own. For one thing there is the difficulty of determining when there is majority acceptance of a particular pattern of behaviour. More importantly, a system of rules based upon majority opinion is apt to be highly unstable. Yet when Hayek discusses rules of just conduct it seems quite clear that he is thinking in terms of something of a rather enduring nature.

The final difficulty with basing agreement upon majority opinion is philosophical rather than practical. Determining the rules of just conduct by majority opinion presents the very real threat of majority tyranny. For if a simple majority is sufficient to establish a pattern of behaviour as a rule of just conduct, it is distinctly possible that rules so established might be inimicable to the interests of a significant minority. This most certainly is incompatible with Hayek's advocacy of the cause of individual liberty.

Now, if unanimity is not practical, and majority opinion is neither practical nor desirable, what remains? The only possibility appears to be that very vague idea known as consensus. Consensus is less than unanimity, but more than majority; and it seems to defy any more precise definition than that. But if it is consensus agreement which is necessary to turn patterns of behaviour into rules of just conduct, and if consensus defies precise definition, how are we to determine when there is in fact agreement?

Several approaches come to mind. First, it may simply be the case that it will be apparent when there is agreement sufficient to establish a rule of

just conduct. That is, it may be quite clear that people accept a particular pattern of behaviour as a rule of just conduct. There is difficulty with this approach, however, It must be kept in mind that, at least until such time as they are articulated in the nomos process, the rules of just conduct are unconsciously followed. People simply behave in the appropriate manner without being aware that it is their intent to do so. Their acceptance is, if you will, at the subconscious level. But if it is subconscious, how can it be apparent?

But perhaps we are in error in seeking some sort of express agreement. Perhaps the agreement required to establish rules of just conduct is merely tacit. Thus, the mere fact that people observe a particular pattern of behaviour is sufficient to demonstrate that they have accepted this pattern as a rule of just conduct. At first glance this may appear to be precisely what Hayek has said. But further thought indicates that there are some serious difficulties with this position.

We must keep in mind the role that agreement plays in Hayek's objective conception of justice. It provides the basis for non-volitionality. It explains how it is possible for rules of just conduct to exist without those rules being posited by someone, without those rules being the result of someone's will. Mere tacit acceptance is not adequate to demonstrate this.

That people observe a pattern of behaviour -- or comply with a rule once it has been articulated through the nomos process -- may indicate an acceptance, subconscious or conscious, that this is the appropriate way to act. However, it may also indicate other things. For instance, it may simply indicate apathy. People may observe the pattern not because they think it the appropriate pattern, but rather because they do not care enough to attempt to follow a contrary pattern.

Of even more significance is the fact that people may observe a pattern of behaviour because there is no effective way to resist. This is especially likely to be the case once the nomos process is operating in conjunction with an effective enforcement agency; and it becomes even more likely the greater the size of the society in question. Being realistic, one must admit that in, say, contemporary Britain or the United States there is very little opportunity for the populace to defy or resist the decisions of the courts. Those decisions are accepted by the populace, but that they are in no way indicates that this is because they are believed to represent the underlying pattern of behaviour. Yet this is what Hayek would have us believe: that the rules articulated by the judges are accepted by the populace because they reflect the underlying pattern of behaviour. That may be the case, but the mere fact that the rules are tacitly accepted by the populace most certainly does not demonstrate this to be so. Agreement cannot be presumed, it must be shown to exist.

And that is a task which I have so far been unable satisfactorily to accomplish. The only solution I see to this difficulty smacks very much of bootstrapping. But it is, I repeat, the only solution which I see. I would suggest that by its very nature consensus exists only so long as one does not have to prove it exists. It is in a sense self-evident. Once a serious challenge has been raised as to whether there is in fact a consensus on a particular point, it is probably safe to conclude that there no longer is a consensus. But if this is the case, the implications for Hayek are serious. If rules of just conduct rest upon consensus agreement, and if such consensus exists only so long as there is no serious challenge to it, the fact that Hayek considers his entire social theory under attack suggests that the rules of just conduct which are essential to

the maintenance of that system may no longer be supported by consensus.

Let us now change our tack slightly. Heretofore the concern has been with what is encompassed by the idea of agreement. Let us assume now that the previous questions have been satisfactorily answered. The question which then must be confronted is how likely is it that there will be agreement of the sort which Hayek requires in order for there to be rules of just conduct.

At the outset of this particular inquiry we must begin by noting the connection between rules and values. In the chapter on justice we have already discussed the meaning of the concept of value. But it is worth quoting again Hayek's own definition:

Which term we shall understand to refer to generic classes of events, defined by certain attributes and generally regarded as desirable. By 'desirable' in this connection we thus mean more than that a particular action is in fact desired by somebody on a particular occasion; it is used to describe a lasting attitude of one or more persons to a kind of event. ²

Now at the very least it must be the case that the rules of just conduct which people accept are not incompatible with the values which they espouse. Any such incompatibility would be quite illogical. But more than that, is it not also likely to be the case that the rules of just conduct will reflect the values which people espouse? Thus, if people consider some class of events desirable would we not also expect them to accept rules of just conduct which are conducive to the pursuit of those values? I think that clearly to be the case.

Of course, Hayek goes to great lengths to try to divorce the rules of just conduct from any underlying values. It is to this end that he stresses that the rules must be general and purpose-independent.

The idea of purpose-independence in particular is aimed at dispelling the suggestion of any undue connection between the rules of just conduct and particular values. Notwithstanding these efforts, however, I think that Hayek fails to achieve the separation he seeks between rules and values. This for two reasons.

First, while he stresses the general purpose-independent nature of the rules, the fact is they cannot be too much so this way. The function of the rules is to guide conduct so as to make a viable social order possible. Overly vague rules quite simply cannot achieve this function. A rule which is totally devoid of purpose will not effectively guide conduct. Thus, while very specific purposes can be avoided, to avoid any purpose is to produce a non-rule. The second reason why I think that Hayek fails to divorce rules from values is that he apparently forgets that his own social order is an ideology and as such is made up of component values. That this is so was discussed in the beginning of the chapter on Law, and I will not here repeat that discussion. Given this 'ideological base' it would be most incongruous for Hayek to maintain that there is no connection between rules and values.

Now, it is this connection between rules and values which is the source of my questioning how likely it is that there will be any great amount of agreement on rules of just conduct in a contemporary society. Several types of problems arise. But all stem from the fact that there is not likely to be any sort of consensus agreement concerning values.

One source of difficulty is the fact that values are apt on occasion to conflict. The only way to avoid such a result would be to assume some sort of monolithic hierarchy of values, such that all conflicts could be resolved within the system. As it is though, Classical Liberalism with which Hayek allies himself espouses the notion of a plurality of values. And if there is a plurality of values, not only are values

apt to conflict, but people are apt to attach different weight to different values. Since then the rules reflect values, and since there is unlikely to be any consensus on values, how can we expect there to be any consensus on the rules?

A similar source of difficulty is the argument that values are espoused not so much on a society-wide level as on the level of various sub-groups. Thus, it can be argued that values are relative to such factors as class, ethnic background, and religion. Inasmuch as any Great Society, such as Hayek envisions, will almost certainly evince considerable diversity in each of these factors it seems difficult to believe that such a society will manifest sufficient consensus of opinion on values to produce the necessary agreement on rules of just conduct.

The two sources of difficulty I have considered to this point both involved conflict between the values espoused by different individuals at the same time. However, we must also recognize that there will almost certainly be conflict between values over periods of time. Conflict is, perhaps, too strong a word for what I have in mind. What I am concerned with is the fact that Hayek gives one the impression that the rules of just conduct found in any society, together with the underlying values which those rules reflect, will be relatively static. This seems to me a quite counterfactual assumption.

There are several factors which lead one to conclude that values must be treated as dynamic rather than static. One is that there are apt to be gradual changes in values reflecting changes of other sorts in the life of the society. A second is that values can be deliberately changed, either by legislation or judicial opinion, or by the example of influential figures. The decisions of the Warren court and the civil rights legislation of the 1960's are good examples of these first two avenues of change. Now, the crucial point

here is not that values change, but rather that change will almost certainly be gradual. The problem this raises is what happens when values are in flux? Assuming there had been a consensus, at some point that consensus will disappear, and it may be a considerable time before a new consensus forms. What happens to the rules of just conduct which depend upon consensus for their existence during this time of flux?

The upshot of the preceding few pages is to raise the factual question of how much agreement on basic values there actually is in contemporary societies. Certainly there must be considerable agreement, else the society could not maintain its cohesion. But it is not the areas of agreement which warrant attention. Rather it is the areas of disagreement with which we should be concerned. And these appear to be significant. In a society such as the United States one could illustrate this point by raising such issues as abortion and capital punishment.

But one need not be that specific either in issue or in society to deal a telling blow to Hayek. Consider instead just two points: the movement from cosmos to taxis, and the pursuit of social justice. Hayek maintains that both of these trends are inimicable to the values his social order represents. Yet the very fact that they are current trends demonstrates that there is considerable agreement upon the values which these trends represent. Recall then my earlier conclusion that once it become necessary to defend a consensus that consensus no longer exists. Are we not forced to conclude then that the social order which Hayek seeks to defend is not, in fact, based upon a consensus agreement. And if it is not based upon agreement, then the objectivity upon which he places so great a value is no longer present.³

C. Problems with Nomos

It may be argued that in the foregoing section I placed too much emphasis on the need for agreement to underpin each of the rules of just conduct. Yes, agreement is necessary. But surely not for all of the rules. It is true that Hayek speaks as if every rule articulated through the nomos process must rest on the underlying agreement of the populace as to the appropriate behaviour. But perhaps this is mere rhetoric.

When one considers the sheer number of rules of just conduct which will comprise any system, and when one adds in that the hard cases with which the judges must grapple are generally novel situations for which there is no previous pattern of behaviour, it seems patently obvious that Hayek cannot really be suggesting that all the rules of a system will rest upon the agreement of the populace. Is it not much more likely that what he intends is that there will be agreement on the basic principles about which the rules of the system are structured? And it is these principles which the judges will identify and utilize in making their decisions in the nomos process.

Now, this approach may appear to sidestep many of the problem areas concerning agreement which I raised in the previous section, although whether there is agreement on basic principles is still open to challenge. But in any event all this approach does is raise a new series of problems for the objective conception of justice. As we have already seen, the purpose of nomos is twofold. First, it is to articulate the appropriate rule in difficult cases in which it is not apparent what the proper pattern of behaviour is. Second, in genuinely novel situations in which there is no apropos pattern of behaviour, nomos must develop

a rule which not only resolves the problem but also is compatible and derived from the existing system of rules of just conduct.

Hayek maintains that in each of these situations nomos is a matter of reason and not will. That is although the judge has decisions to make in these situations, those decisions depend on his rationality and not upon his volition.

The judge may err, he may not succeed in discovering what is required by the rationale of the existing order, or he may be misled by his preference for a particular outcome of the case in hand; but all this does not alter the fact that he has a problem to solve for which in most instances there will be only one right solution and this is a task in which his 'will' or his emotional response has no place. 4

It is essential for Hayek that this be the case if he is to uphold the integrity of his objective conception of justice. Should it turn out that the decisions made by a judge in the nomos process are primarily dependent upon his will, then Hayek could no longer claim that he has put forward a conception of justice which is volition free. He would then in effect be putting forward nothing more than a variation on the positivist conception of justice.

In this section I wish to suggest that the nomos process is far from as clearcut and straightforward a matter of reason as Hayek would have us believe. At the very least, as Hayek himself admits, it is not a matter of simple deductive logic. There are a variety of decisions which a judge has to make which cannot be made by simple deductive reasoning. Even the fact that the test of justice is negative and not positive does not eliminate the need to make these decisions.

As with the preceding section of this chapter, I will not be suggesting that the nomos process as Hayek has depicted it is inherently unstable. Rather, I will be suggesting that there are gaps in what he says. It may be possible to fill these gaps. But until such time as he does that, nomos does not do for him what he thinks it does. This section will be relatively short as, for the most part, it will consist of little more than pointing out problems with which Hayek has failed to deal.

I see four basic areas in which questions can arise which, at least at first glance, will have to be answered by will and not reason. At the threshold there is the question of how the problem is to be characterized. While the facts of a case may be pretty much pre-ordained (and even here there can be a certain looseness) there can be considerable leeway as to how the issues are to be characterized. Thus, a problem does not come ready labelled. Rather, it is up to the judge to determine what are the issues with which he will deal.

Once the issues are determined, the next question to be confronted is what principle or principles are applicable to these issues. If we grant Hayek his basic premises, the judge is expected to be familiar with the basic principles which underpin the system of rules of just conduct with which he is dealing. But merely knowing the principles of the system does not guarantee any sort of self-evidence about which principles are applicable to which issues. That is a decision which the judge must make.

There is one interesting aside worth noting in regard to this problem. That is the question of what sort of principles a judge may utilize. We have seen in an earlier chapter that for Hayek the essence of the law-morality distinction is that the former relies upon an organized enforcement agency. The question is whether this distinction precludes a judge

from utilizing moral principles in the nomos process. If it does not, and given that the judge is a part of the enforcement agency, does the mere utilization of a moral principle in the nomos process convert it into a legal principle. Interesting though this question may be, Hayek gives us no indication how he would answer it.

The third source of difficulty for Hayek's nomos process involves situations in which principles conflict. To wit, even though the issues have been characterized and the applicable principles identified, it may turn out to be the case that the latter are not compatible. Thus, the principles deemed applicable may dictate contrary results. When this occurs, it is the judge who must determine which of the applicable principles to follow.

The fourth and final source of difficulty involves the weighing of consequences. Particularly when dealing with contrary principles, but in other situations as well, it may be necessary for a judge to pay heed to the consequences of making a decision one way or the other. It is all very well to speak of weighing consequences in such a situation, provided one realizes that any talk of weighing is purely metaphorical. At the end of the day what really must be done is that a decision must be made as to which consequences are most desirable, or perhaps least undesirable. And it is the judge who must make such a decision.

In addition to these problems which are specifically found in the nomos process, there are two other problem areas related thereto which warrant notice. Again, all that can be said is that Hayek does not address these area.

The first is the question of what happens when there is a difference of opinion between the judges or other legal experts. The question is not so much what you do about it, as it is how you explain it.

If nomos is a matter of reason and not will, then it seems most disturbing to find the putative legal experts disagreeing amongst themselves. One can try to explain away the difficulty by maintaining that one side or the other must be involved in erroneous reasoning. The problem will be to demonstrate this, given that the supposedly errant side will undoubtedly be quite prepared to issue a rational defense of its position. And if one tries to come to grips with the differing positions, one is apt to find that the source of the disagreement lies in different decisions on such matters as relevance and importance. And differences of this nature unfortunately give the appearance of being a matter of will and not reason.

The other area worth noting is the question of whether there can ever be gaps in the law. That is to say, can cases ever arise in which there is simply no relevant law? Certainly Hayek speaks as if this will never be the case. Thus, he talks about a rule being "'implicit' in the body of the existing rules".⁵ And yet, he tosses this point off as something so obvious as to warrant neither explanation nor proof. With all due respect, I think that further discussion is warranted. To 'create' a rule which after the fact can be made to appear compatible with the existing system of rules is quite different from saying that the existing system provided an answer to the question at hand. And this difference is crucial if one is concerned with defending a non-volitional conception of justice.

To sum up this entire section, Hayek is confronted with and has failed to deal with a basic problem of legal theory. And that is the problem of judicial discretion. Are judges totally unfettered in making decisions in so-called hard cases, or are there limits, great or small, as to what they can decide? This is an issue with which Hayek totally fails to come to grips. He simply tells us that nomos

is a matter of reason and not will, and he lets it go at that. Certainly one cannot extrapolate a theory of legal reasoning from what he says, for he says virtually nothing. There is not even enough said on this subject to construct a Hayekian, as distinct from Hayek's, theory of legal reasoning.

Oh, one could attempt to construct a theory of legal reasoning which would be compatible with Hayek's overall social philosophy. Or, one could attempt to demonstrate that an existing theory of legal reasoning, such as MacCormick's⁶ or Dworkin's⁷, is compatible with that philosophy. But both of those would be major tasks, and both are outwith the scope of this dissertation. Moreover, to be quite blunt, the problem is not mine, it is Hayek's. He is the one who has put forward a conception of justice which he claims to be objective, objective especially in the sense that it is non-volitional. To defend that claim he must show that judges are carefully circumscribed in making the sorts of decisions which are required by the nomos process. This he has failed, or rather omitted to do.

Let me now sum up the argument of this chapter. What I have attempted to do is demonstrate that volition may play much more of a role in Hayek's conception of justice than he admits. I do not maintain that I have succeeded in rebutting the claim of objectivity. Rather, I think that I have demonstrated that there are quite a number of fuzzy edges which are caused by unanswered questions. Until such time as the questions I have raised are satisfactorily answered, it seems to me that Hayek has failed to clearly establish that the pursuit of social justice presents a razor sharp choice between a positivist and an objective conception of justice.

CHAPTER NINE

PROBLEMS WITH THE CRITIQUE OF SOCIAL JUSTICE

As we saw in Chapter Six, Hayek's critique of social justice can conveniently be viewed as having three distinct, albeit related, prongs. The first is that social justice is a meaningless concept. The second is that social justice is inevitably incompatible with certain key elements of Hayek's social philosophy. And the third is that the very pursuit of social justice is inimicable to respect for individual liberty and certain other values associated therewith. In this chapter I will examine from a critical standpoint the first two prongs of Hayek's attack on social justice. I will reserve comment upon the third prong of that attack until the next chapter.

At the outset I wish to make clear the standpoint from which I will approach Hayek's critique. I will do so from within the basic parameters of Hayek's social philosophy. That is to say, I will grant him his fundamental premises and will then consider whether the critique of social justice is actually justified by those premises. The nature of this approach must be kept in mind. Neither this chapter, nor this dissertation purports to be a definitive analysis of the concept of social justice. What it does purport to be is a definitive analysis of Hayek on social justice.

If one began with fundamental premises different from those with which Hayek begins, one's approach to social justice would likely be quite different, and obviously conclusions of a very different nature might be drawn. A comparison of the conclusions reached by a different methodology with the conclusions reached by Hayek would certainly be interesting and probably be informative as well. That I repeat, however, is not my present task. It must be recalled that I came to this dissertation initially as one who sympathized with Hayek's conclusions. My concern, therefore, was, not to convince others who might find Hayek's position anathema from the start, but rather to convince myself that his critique of social justice was genuinely viable. That being the case, it is only reasonable that my analysis should take place within the parameters of Hayek's system.

Now, as I have already noted, this chapter will consider the first two prongs of Hayek's attack on social justice. In the first part I will argue that the concept of social justice is not as altogether devoid of meaning as Hayek would have us believe. One can, in fact, talk intelligently of a concern for social justice. In the second part I will argue that there is no necessary incompatibility between the pursuit of social justice and the various elements of Hayek's social system. It may be that the pursuit of social justice is often incompatible with Hayek's social system; but it need not always be so. Finally, in the third part of this chapter I will return to the concept of social justice and consider in some detail what is entailed by that concept.

A. Social Justice is not a Meaningless Concept

Hayek's initial objection to "the mirage of social justice" is that the term social justice is actually devoid of any real meaning. Thus, although people constantly talk of social justice and constantly

appeal thereto in criticizing a wide variety of situations and institutions, when one tries to identify precisely what it is to which they are appealing it soon becomes apparent that there is no real substance to the term.

Of course, it is not that people mean absolutely nothing when they appeal to social justice. They do have some meaning in mind to be sure. The problem, according to Hayek, is that the meaning of the term tends to be quite idiosyncratic. When people speak of social justice there is a wide variety of concepts to which they can be referring. Among those Hayek discusses as proffered meanings for social justice are the common good, the general welfare, equality of material position, equality of treatment, equality of opportunity, and distributive justice. There is nothing even faintly approaching a consensus as to which of these concepts accurately embodies the essence of social justice. Moreover, each of these concepts when considered individually is itself quite vague and subject to a variety of interpretations as to its real meaning. Hence, the real problem is not that social justice has no meaning, but rather that it means all things to all men. It is in this sense that Hayek says it is meaningless to speak of pursuing social justice.

However, in my opinion Hayek's reasoning is faulty. The same reasoning, if applied to the concept of justice, would produce the conclusion that justice is a meaningless term. Consider, there are probably as many, or more, proffered meanings of justice as there are of social justice. It is thus that Chaim Perelman can say:

It is vain to try to enumerate all the possible meanings of the idea of justice. Let us, however, give a few examples which constitute the most current conceptions of justice ...

1. To each the same thing.
2. To each according to his merits.

3. To each according to his works.
4. To each according to his needs.
5. To each according to his rank.
6. To each according to his legal entitlement. 1

And, just as there is with social justice, not only is there no consensus as to which of these ideas captures the 'real' meaning of justice, but the meaning of these ideas themselves is open to dispute, some more so than others.

Of course, Hayek would likely reply that he has, in fact, demonstrated to us the real meaning of justice. The other proffered meanings are simply erroneous interpretations. Unfortunately for Hayek, however, other theorists of justice would be equally prepared to argue that they have demonstrated the real meaning of justice and that it is Hayek and others who are in error. (And for that matter, theorists of social justice would argue that they have demonstrated the real meaning of the term, and that it is Hayek with his claim of meaninglessness who is in error.) Thus, with justice, just as it is with social justice, there is a variety of meanings, each subject to varying interpretations, attached to the term. If this result dictates that we deem social justice meaningless, it must also dictate that we so deem justice. Yet surely not many people, least of all Hayek, would argue that justice is a meaningless term, and that to pursue justice is to pursue a mirage.

I suggest that the heart of Hayek's difficulty, the source of his problem, is that he has confused the term "concept" with the term "conception". The difference between the two is explained well by John Rawls in reference to justice:

Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common. [Footnote omitted] 2

To paraphrase, a concept is the common denominator which ties the various conceptions together, it is the essence which must be shared in order to ensure that the various conceptions are actually addressing the same problem. It should be noted that to speak thus of concept and conception is not necessarily to assume the existence of any metaphysical entities. It is enough to view the two terms as relating to the way in which language is used. The concept is, if you will, the legitimate parameters of a word in the appropriate language; outwith these parameters the word is simply being misused.

I am suggesting that Hayek's difficulty with finding any meaning to the term social justice results because he mistakes the various conceptions of social justice for expressions of the concept. Such ideas as the common good, substantive equality, and distributive justice are, to use Rawls' words, "different sets of principles" proffered to give substance to the concept of social justice. That such sets of principles may be unduly vague and may to some extent be inconsistent with one another does not gainsay the fact that they share some common core which constitutes the concept of social justice. Moreover, for people to pursue such conceptions is certainly not for them to embark on a meaningless activity. Hayek's argument demonstrates not that the concept of social justice is meaningless and that the pursuit thereof is for that reason futile, but rather that, not surprisingly, there are a variety of conceptions of social justice currently in vogue.

Now, Hayek may want to come back and argue that, conceptions to the side, the concept of social justice is itself meaningless. But this, I stress again, he has of yet not done. However, even should he attempt to do so, I think that attempt is doomed to failure. Standing insurmountably at the threshold is the widely held intuitive belief that social justice is a meaningful concept. And Hayek himself has recognized that our "sense of justice" is something

which must be taken account of.³ The fact of the matter is that large, very large, numbers of people believe in social justice. Hayek himself admits that social justice is constantly being held up as a standard of criticism.

The appeal to 'social justice' has nevertheless by now become the most widely used and most effective argument in political discussion. Almost every claim for government action on behalf of particular groups is advanced in its name, and if it can be made to appear that a certain measure is demanded by 'social justice' opposition to it will rapidly weaken. People may dispute whether or not the particular measure is required by 'social justice'. But that this is the standard which ought to guide political action, and that the expression has definite meaning, is hardly ever questioned.⁴

However, while granting the existence of this widespread belief in social justice, Hayek does take steps to discount it. Specifically, he offers two arguments. First, he suggests that often appeals to social justice are no more than disguised expressions of envy and self-interest.⁵ This is an interesting suggestion to be sure. However, a suggestion is all it is, for Hayek offers nothing by way of substantiation. To those who, like Hayek, oppose most appeals to social justice this suggestion may appear self-evident. But in the realm of serious argument it bears about as much weight as statements such as "most people on welfare are lazy and do not want to work." Moreover, even were one to grant arguendo that some appeals to social justice do rest upon envy and self-interest, this would not explain the significant number of such appeals in which there can be no hint of these factors. I refer to the work of social philosophers and to appeals to social justice by people who would have to be described as financially well off. In such cases

envy and self-interest can serve no function. To attempt to explain, say, John Rawls' monumental defense of social justice⁶ by reference to envy could only be described as bizarre.

Hayek's other attempt to discount the intuitive belief in social justice is a sort of analogy. He suggests that belief in social justice is a "quasi-religious superstition" akin to the belief in witchcraft.⁷ Just as the fact that people at one time believed in witches in no way demonstrated that witches actually existed, so too the belief in social justice in no way demonstrates that it exists. With all due respect, this argument fails completely, and it fails because Hayek has become rather confused concerning what it is he is arguing about.

It is true to say that the mere fact that people believe in witches does not demonstrate that witches exist. It does not follow from this, however, that the concept of witch is meaningless. Quite the contrary. People could neither believe nor disbelieve in witches unless the concept had some meaning. Pace Hayek, that people believe in witches does in fact demonstrate that the concept of witch has meaning. So too with social justice. That people believe in social justice demonstrates prima facie that the concept of social justice has some meaning. To be honest, I must admit that there is an analogy which can be drawn with the witchcraft example. But it is quite different from the one which Hayek has drawn. What we could say is that the mere fact that people believe in social justice -- i.e. believe that a certain type of behaviour is in some way obligatory -- does not demonstrate that such behaviour is actually obligatory. This analogy, however, goes to the question of whether social justice should be pursued and not whether it has any meaning.

To sum up, the widespread intuitive belief in social justice warrants a rebuttable presumption

that the concept of social justice has some meaning. Neither Hayek's argument based on envy and self-interest, nor that based on the analogy to witchcraft succeeds in rebutting that presumption.

Of course, it could still be the case that, while people express a belief in social justice, and while this belief is not contaminated by any base motives, this belief could yet be meaningless in that there is no genuine agreement among people as to what it is in which they profess to believe. That is to say, people may believe in 'social justice', but that term may mean quite different things to different people. The term would then have a variety of meanings, but no single common meaning. It would in that sense be meaningless. This is probably the argument Hayek attempted to make when he became muddled in the difference between a concept and a conception.

Now, if that is the argument one wants to make, it seems to me there is a very simple but telling approach to take. Rather than attempting as Hayek has done to set forth a compendium of meanings of the concept in question and then to demonstrate that these meanings are mutually incompatible, why not simply shift the burden of proof? Demand that the proponents of the concept, in this case social justice, explain precisely what that concept means. After all, the surest way to prove that something exists is to produce that something. It is to that challenge to which I now turn.

At the outset let me note that it is not my intention to set forth a comprehensive definition of social justice. Whether it ever makes sense to talk of the idea of an all encompassing definition is, in my opinion, doubtful. Fortunately, however, that is not an issue with which I need here concern myself. For my present purposes it will be more than adequate to 'define' the concept of social justice in only a very loose sense. To rebut Hayek's claim that social justice is meaningless I need only to imbue that concept with a

content sufficiently broad to embrace the various conceptions of social justice with which Hayek was concerned, yet not so vague as to be devoid of any real meaning.

Interestingly, it seems to me that the most effective way to do this is to utilize Hayek's conception of justice as a background against which to sketch the concept of social justice. Inasmuch as one of Hayek's major objections to social justice is its alleged incompatibility with his conception of justice, the approach appears eminently reasonable. What better way to grasp the meaning of social justice than to focus on the difference between that concept and Hayek's justice. Let me stress again, however, that this approach is not intended to produce any definitive statement about social justice. It is intended to demonstrate only that the claim that the concept of social justice is without meaning is unwarranted.

As we have seen numerous times already, the essence of Hayek's conception of justice can be epitomized as follows: justice is the universal application of a coherent system of rules of just conduct. At the risk of belaboring the obvious, let me point out that, phrased this way, this conception has two elements: universal application and a coherent system of rules. These elements are concerned with form and procedure. What they evince no concern with is content.

In the chapter on justice we did discuss at some length the charge that Hayek's conception of justice is indifferent to the content of the rules on which it relies. We saw that that charge is not altogether accurate in that the form Hayek prescribes for the rules of just conduct will affect the content of those rules. Nonetheless, it remains the case that the primary emphasis of Hayek's conception of justice is on form and procedure. Any concern with content is incidental and is dependent on the requirements of form and procedure. It is this emphasis which explains statements such as the following:

Often the content of the rule is indeed of minor importance, provided the same rule is universally enforced. 8

[J]ustice is not concerned with the results of the various transactions but only with whether the transactions themselves are fair. 9

In short, for Hayek justice is concerned not so much with what you do as with how you do it.

By contrast, the primary emphasis of social justice is virtually the opposite of that of Hayek's conception of justice. To speak of social justice is to evince a concern with content rather than form and with effect rather than procedure. Social justice is not content merely to have a coherent system of rules. It is concerned, instead, with what those rules are. Likewise, social justice is not satisfied provided only that the rules are universally applied. It also is concerned with the effects of applying the rules universally. One might say that, whereas justice (Hayek's justice) concentrates on rules, social justice concentrates on people. Hayek obviously believes that if you look after the rules, the people will look after themselves. The proponents of social justice are not so sanguine, they believe we must never lose sight of what is actually happening to people.

So far so good. But as is, the scope of social justice appears virtually unlimited. That scope can, I think, be considerably narrowed. And that narrowing results when we consider the nature of the concern expressed by the various conceptions of social justice with which Hayek dealt, and attempt to extrapolate therefrom a common denominator. Though there may be disagreement about how to express it in words, the essence of that common denominator seems to me quite apparent.

The essential focus of social justice is what I will call the welfare of individuals. By

welfare I denote the wellbeing of individuals, wellbeing of both a physical and a psychological nature. Welfare encompasses such elements as food and shelter, housing and medical care, self-respect and dignity. Falling back again on our comparison with Hayek's justice, we can say that social justice is concerned with the effect the rules of justice have on the welfare of individuals.

Of course, it goes without saying that the concern of social justice with the welfare of individuals is a moral concern. Thus, someone who favors welfare oriented action on the grounds that it is apt to keep the have-nots from causing civil disruption (as Hayek himself does on at least one occasion)¹⁰ demonstrates prudential considerations and not a concern for social justice. The moral concern might be expressed in terms of the rights of the recipients or the duties of the well off, or it may take some other form altogether. But unless the concern is morally based, it is not a concern for social justice.

Now, this moral concern with the welfare of one's fellows has not gone totally unnoticed by Hayek. He has noticed it, but only so far as to dismiss it out of hand. To him such concerns represent a throw back to the morality of the tribal or closed society. They may have had a place then, in a society which was relatively small and in which people knew each other well. However, in the Open or Great Society which Hayek advocates there is no place for such concerns. Again, as in the analogy to witchcraft, this response goes to whether social justice ought to be pursued, not to whether it has any meaning. Whether Hayek approves or not, the fact is that when people speak of social justice they are speaking of a moral concern for the welfare of their fellows.

The final point to note about this concept of social justice as I am depicting it is that, like Hayek's justice, it is a value. It is not something which can be achieved once and for all. Rather

it is an indefinite ideal. It is a perpetual concern with the welfare of one's fellows. The nature of that concern will, of course, depend both on the particular conception of social justice being espoused and on the nature of the society which is involved. But whatever the nature of that concern, it will be an ideal towards which its proponents will constantly aspire, but never expect to attain.

It should by now be apparent, if it was not so from the start, that social justice is a concept quite distinct from Hayek's justice. No small part of Hayek's difficulty with social justice stems from the fact that he considers it simply some kind of variant of justice. Given the nature of his conception of justice, it is difficult to imagine what a variant thereon would constitute. And I suppose that explains in part Hayek's problem: he both thinks it is a variant, and yet cannot understand how it can be. From that he concludes that social justice must be meaningless.

However, as we have just seen, the two concepts are distinct, although they may in a sense be complementary. Justice (Hayek's justice) takes the nature of a concern for form and procedure, social justice takes the form of a concern for substance and effect. There is, of course, some room for overlap. Two aspects of social justice can be isolated. The first is the moral concern with the welfare of individuals. The second is the action which results from that concern. Now, it may very well be that resultant action will take the form of rules of just conduct. When, and if, that happens social justice has entered into the realm of justice and Hayek's conception of justice will be applicable thereto. In such situations one might indeed think of social justice as a variant of justice. But, notwithstanding such possible situations, the fact remains that social justice is a concept separate and distinct from Hayek's justice.

Let me now recap this section. Herein I have attempted to demonstrate that, notwithstanding Hayek's arguments to the contrary, the concept of social justice is a meaningful concept and hence the pursuit thereof is not a pointless activity. Without claiming any finality or completeness therefor, I have put forward a 'definition' of social justice: to wit, social justice is a moral concern with the welfare of one's fellows. I will be the first to admit that this definition is rather general to say the least. But I doubt that it is any more general than attempts to define the concept of justice. (Consider: justice means rendering to each his due!)

The fact is that the real heart of a concept such as social justice lies in the various conceptions thereof which are put forward. As soon as we introduce ideas such as the common good or substantive equality, we are dealing in much more concrete terms. Of course, we are also dealing in much more controversial terms. And for that reason the mere appeal to social justice will tell us very little. Before being able to come to grips with that appeal we will first have to learn precisely which conception of social justice is being appealed to. But to say this is to give reason for going behind an appeal to social justice. It is not to justify disregarding that appeal altogether.

Hence, to deny as Hayek does that social justice has any meaning is simply to avoid coming to grips with the real problem. And for that reason I think that it is not the pursuit of social justice which is futile. What is futile is to attempt to deter the pursuit of that concept by arguing that it is meaningless.

B. Social Justice is not Necessarily
Incompatible with Hayek's Social System

Although Hayek goes to great effort to demonstrate that the concept of social justice is meaningless, this line of argument does not constitute his entire attack on "the mirage of social justice". Hayek is willing to grant arguendo that social justice may have some extremely vague meaning; he accepts some loose notion of distributive justice. But, he says, even if we grant that the pursuit of social justice is the pursuit of distributive justice, it is not possible to undertake such a quest within the social system which he has described. This is because the pursuit of social justice will prove at several points to be incompatible with Hayek's social philosophy.

To demonstrate this incompatibility Hayek considers a variety of conceptions of social justice. He shows how what is required to attain or even pursue each of these conceptions will run afoul of various aspects of his spontaneous order. The arguments which he makes have already been discussed at length in Chapter Six of this dissertation, and for our present purposes there is no need to repeat them here. The fact of the matter is that I have no serious problems with this aspect of Hayek's argument. Thus, it does seem to me that Hayek has persuasively argued, for example, that substantial equality of material position is not something which can be achieved within the parameters of a spontaneous order.

My disagreement with Hayek is not with these particular arguments. It is, instead, with the conclusion which he draws therefrom. From the fact that the various conceptions of social justice which he considers are incompatible with his social system

Hayek concludes that there is necessarily and inevitably an incompatibility between the pursuit of social justice and his social system. In my opinion this conclusion is an unwarranted generalization. That some conceptions of social justice are incompatible with Hayek's social system certainly does not demonstrate that all conceivable conceptions are likewise incompatible.

In order for Hayek's conclusions to prove valid, the concept of social justice would have to be far more monolithic than it in fact is. Interestingly, in arguing that the pursuit of social justice per se must inevitably conflict with his social system, Hayek appears to be forgetting his own argument about the meaninglessness of social justice. He was led to this latter conclusion by the multiplicity of meanings attached to the term social justice. Now, as I argued in the previous section, this multiplicity of meanings in fact represents differing conceptions of social justice. It is these multiple meanings, these different conceptions, which provide the substance of any appeal to social justice. And given these multiple meanings, to assume that whatever applies to one conception of social justice must apply to all other conceptions is a baseless assumption. Yet Hayek has made just such an assumption.

In this section I intend to meet head-on Hayek's claim that the pursuit of social justice must always be incompatible with the integrity of his social system. I will do so by showing that it is possible to evince a concern for social justice which does not run athwart the essential elements of Hayek's social philosophy. For purposes of this discussion those essential elements can be treated as three: the spontaneous order, rules of just conduct, and justice. Obviously my division is highly artificial inasmuch as the three elements are inextricably intertwined.

However, some division is necessary in order to allow the argument to proceed in some rational manner.

Now, the first topic to be considered is the relation between social justice and the cosmos or spontaneous order. Although Hayek prefers to think of social justice as a meaningless concept, he is willing to grant that it carries some vague notion of distributive justice. But if that is the case, then social justice most certainly cannot be pursued within the spontaneous order. The one thing you must have to speak of distributive justice is a distribution. And the one thing a spontaneous order does not have is a distribution. In a spontaneous order no one distributes income or wealth, the normal foci of concern when one speaks of distributive justice.

It should be noted here that in this context when Hayek is speaking of the spontaneous order he intends a catallaxy or market economy. As was discussed in an earlier chapter, it is far from clear whether spontaneous order and catallaxy are co-extensive, or whether the latter is merely a variety of the former. Be that as it may, when Hayek denies that the spontaneous order involves a distribution he is clearly speaking of a catallaxy.

That there is no distribution in a catallaxy, or rather that Hayek so thinks, needs little discussion. Certainly there is no need to discourse at any length upon his general theory of the market economy. Wages and other remuneration, according to Hayek, are neither assigned by any particular individual, nor are they a reward for merit. They are instead an impersonal signal from the market by which it indicates which courses of behaviour should be pursued and which abandoned. Now, it may of course be possible to challenge Hayek's economic analysis of the market economy. But to do that is to undertake a task clearly outwith the scope of this dissertation.

However, that line of approach is not the only avenue by which one can challenge the assertion that the market economy does not involve a distribution.

One can, and I do, challenge Hayek's understanding of what is involved in a distribution. Hayek assumes that one can speak of a distribution only if there is a personal and intentional distribution. Were that the case, then it would appear that there is no distribution in the catallaxy. However, why concentrate on the distributor to the exclusion of the distribution? Can we not speak of a distribution any time we are concerned with the way in which something is dispersed, provided only that human agency plays some part in the dispersal. In fact, to turn Hayek's words about, is it not sufficient to constitute something a distribution if it is the result of human action, even though not the result of human design.

A very similar opinion is expressed by David Miller, and his words are worth quoting at length.

[I]n order to implement a distributive principle, it is not necessary that there should be a physical act of distribution. A possible distributive principle, for example, is that everyone should retain what he currently possesses. Nor does it follow, in cases where redistribution is necessary to satisfy a principle, that some one person or agency must act as a distributor; a distributive ideal may be implemented by the concurrence of a large number of people or institutions. One must avoid taking 'distribute' and its derivatives too literally here. 11

In denying that the catallaxy constitutes a distribution, it seems to me that Hayek takes the word 'distribute' too literally.

In that income and wealth are to a large extent determined by the catallaxy, it is in fact the case that the catallaxy is a distribution. It is, if you prefer, a procedural rather than a substantive

distribution. That is, while it does not assign particular things to particular people, it constitutes a procedure whereby particular things are assigned to particular people. And such a procedure is no less of a distribution than the specific assignment. To give a very trite example, a mother who determines that a toy will go to one of her two children on the basis of the flip of a coin distributes that toy just as much as if she simply decided to which child to give the toy.

Now, Hayek's response to this argument would undoubtedly be the following, Alright, I'll grant you that a procedure can constitute a distribution. It does so, however, only if we choose to use that procedure as a method of distributing. What you forget about the catallaxy is that it is a cosmos and not a taxis. The catallaxy was not deliberately created, rather it simply evolved. That being the case, there was no conscious decision to utilize the catallaxy for distributing, and hence there is no distribution.

That argument, even if correct, does not save the day for Hayek. Let us grant him that the catallaxy came about by evolutionary development. The key point is that at this time we are aware how the catallaxy functions, at least in general terms. We are aware that it constitutes a procedure by which income and wealth are dispersed. Given this knowledge, it can fairly be argued that allowing the catallaxy to continue to function constitutes a deliberate decision to disperse in accord with that procedure. And such a decision constitutes a distribution. That we may not choose to alter the catallaxy is, of course, another matter altogether. But that cannot gainsay the fact that the catallaxy is a distribution. Thus, Hayek's claim that distributive justice is incompatible with a spontaneous order because there is no distribution in such an order is unfounded.

In addition to arguing that the very notion of distributive justice is out of place in the context of a spontaneous order, Hayek has a further objection to social justice as it relates to cosmos. That objection is that it is not possible to implement any principle of distributive justice whilst maintaining a spontaneous order. Only a taxis-like society will have the wherewithal to implement such principles. Certainly if our concern is with what Robert Nozick has called a patterned-principle of distribution¹² then Hayek's assessment is correct. For instance, if one seeks to distribute income in accord with moral merit, or if one seeks to achieve substantial equality of material position, the spontaneous order will have to fall by the wayside. There is no way that a market economy can implement such principles. One will instead have to go to a controlled economy, that is to a taxis.

However, if one sets one's sights in a different direction that result need not follow. Consider, if one aims not to achieve substantial equality but rather only to lessen existing inequalities, or if one aims to maintain a minimal level of subsistence below which no one need fall (in effect one of the aims of the contemporary welfare state), one need not go outside of the market economy. A simple re-distribution of income through the tax system will be sufficient to accomplish these goals. And to pursue such goals surely could be described as pursuing social justice. Thus, to this extent at least social justice could be pursued within the context of a spontaneous order.

Closely related to the alleged incompatibility between the pursuit of social justice and the spontaneous order is an alleged incompatibility involving rules of just conduct. The argument here is similar to that we have just considered: to wit, that it is not possible to implement principles of distributive justice by means of rules of just conduct. Only through the use of the specific directives which Hayek

terms rules of organization is it possible to implement such principles. The problem here, according to Hayek, is that general purpose-independent rules will always prove inadequate when it comes to implementing a principle of distributive justice. Admittedly, this will frequently prove to be so. But again I think that Hayek overstated his case in stating that this problem will be ever present. To see that we need only consider what is actually required of the rules of just conduct.

Let us take the requirement of generality first. I can think of no other way to put this than to say I fail to see any reason why generality must be an unavoidable problem for the pursuit of social justice. If nothing else, almost any prescription could be phrased in the form of a general rule. As we have earlier seen, one difficulty Hayek has with the notion of generality is that it is as vague a concept as one could ask for. Generality is not a black/white distinction. Instead it tends to operate in the realm of more general/less general. And this makes it very difficult to know what Hayek really intends when he requires that the rules of just conduct be general.

But even without resorting to any verbal chicanery I do not see that generality must present a problem for social justice. More often than not social justice will be concerned with classes of individuals rather than particular individuals. The focus of concern tends to be those at the lower end of the economic spectrum. And such a group can easily and quite honestly be described in general terms. Likewise, to the extent that there is a redistribution involved, the redistributing tends to affect those above a certain level of well-being. And this group too can be identified in general terms. Thus, it is at least conceivable that one could pursue social justice by means of general rules.

The same factors which make generality no problem also serve to avoid any difficulty with the

requirement that the rules be purpose-independent. In its own way the notion of purpose-independence is as difficult to come to grips with as is the notion of generality. What it does not mean is devoid of any purpose, for a rule which was literally devoid of all purpose would not be a rule. Instead, what Hayek seeks to avoid are rules with narrowly defined ends, ends of the sort which it is possible to achieve once and for all. What he wants are rules which apply "to an unknown and undeterminable number of persons and instances."¹³ What he wants are rules which deal with kinds of situations rather than with a particular situation.

Here again the fact that the concern of social justice will be predominantly with classes of people is dispositive. Often the aim will be not to assist this particular person in this particular situation. Rather, the aim will be to provide a certain kind of assistance to certain kinds of people who find themselves in certain kinds of situations. Similarly, the burden of assisting will fall upon certain kinds of people who find themselves in certain kinds of situations. Given this, the claim that purpose-independent rules will never be suitable for the pursuit of social justice seems clearly unwarranted.

Finally, we turn to Hayek's contention that social justice is incompatible with justice. We have already disposed of a major part of this objection in considering the alleged problems regarding rules of just conduct. Thus to the extent that it is possible to pursue social justice by means of rules of just conduct, then to that extent it is certainly possible to pursue it while applying the same rules to all. And applying the same rules to all, it will be recalled, is what Hayek sometimes calls the basic principle of justice. There are, however, two additional areas which need to be considered. The first is the limitation on the types of things of which justice may be predicated. The second is Hayek's claim that while

there is an objective standard of justice, there is no such standard by which we can determine what social justice requires.

In considering these two areas we should begin by recalling the two aspects of social justice which I have previously isolated. These aspects are a moral concern with the welfare of one's fellows and the resultant action precipitated thereby. To the extent the resultant action takes the form of rules of just conduct -- and I have just argued that it is possible for it to do so -- it falls squarely within the scope of Hayek's conception of justice.

For our present purposes this appears to mean running afoul of the requirement that justice is concerned only with deliberate human action. It is not concerned with states of affairs. Social justice, however, is primarily concerned with states of affairs. In a sense it is also concerned with social institutions, but it is so only as far as these affect states of affairs. Hence, concern with social institutions is at heart a concern with states of affairs.

The state of affairs with which social justice is concerned is the welfare of individuals. As we have seen, whereas justice is primarily concerned with having a coherent system of rules which is uniformly enforced, social justice is concerned with what those rules are and the way in which they affect individuals. Now, in order to avoid the putative conflict with the requirement that justice can only be predicated of deliberate human action, we must in some way view the concern of social justice as involving deliberate human action.

There are two ways in which this can be done. The first is the notion of omissions. The tendency is when speaking of action to think in terms of positive activity, that is of actually doing something. And, as we have seen in the chapter on justice, Hayek does concern himself almost exclusively with positive action.

However, failing to act can also constitute an action. It is, if you will negative activity. But omissions can properly be thought of as actions only if there was some duty to act. As far as the present problem is concerned, the issue turns on whether or not there is an obligation of social justice. In the next chapter I will suggest that it is at least arguable that there is such an obligation. If there is, then the concern of social justice with states of affairs could be viewed as a concern with the failure to alter and/or alleviate that state of affairs. It would, therefore, be a concern with deliberate human action, and justice could appropriately be predicated thereof.

The other way to come at this problem is to recall that when we are dealing with deliberate human action we are also dealing with the intended and foreseeable consequences of action. It is the aspect of foreseeable consequences that is of especial relevance here. Foreseeable consequences can be properly treated as brought about by deliberate action. The argument to be made is that there are certain foreseeable consequences which result from the maintenance of a catallaxy, and that these consequences are relevant to a concern with social justice. Hence in very simple and very general terms one might attempt to argue catallaxy allows levels of poverty and unemployment to occur which can be considered unacceptable from a humanitarian standpoint. If such consequences can, in fact, be shown to be a foreseeable result of the catallaxy, then by maintaining the catallaxy we make these consequences the result of our deliberate action. And thus the predication of justice is appropriate.

The final point to be considered in this section is the argument that, unlike the case with justice, there is no objective standard by which to determine what is required by social justice. Let me note merely in passing that in the preceding chapter I did cast some doubt on the alleged objectivity of

Hayek's conception of justice. But holding that aside here, the question is whether Hayek is correct in asserting that there is no objective standard of social justice.

Certainly to the extent that the concern for social justice has resulted in rules of just conduct Hayek's contention is unwarranted. Once the resultant action is embodied in the form of rules of just conduct the same objective standard would apply thereto as applies to the other rules of just conduct. Such rules would have become a part of the overall coherent system of rules and would be subject to the nomos process. Any subsequent development of those rules would be handled in the same way as it would with any other rule of just conduct.

Where Hayek's challenge is more troubling is when we come to consider how any such social justice rules of just conduct would originate. This is, I suppose, another way of asking where we get the basic principles of social justice. To a certain extent such principles will be dictated by the conception of social justice which we adopt. And, while there may be no objective standard for adopting a conception of social justice, neither is there any such standard for adopting a conception of justice. It must be kept in mind that, while Hayek's justice provides an objective standard, it is not itself reached by any such standard.

But even aside from that, it seems to me that there is adequate raw material from which to draw an objective standard of social justice, at least as objective as that standard which Hayek claims for his conception of justice. For Hayek the basic rules of just conduct originate from spontaneous development. No one sets out to posit these rules, they simply evolve from people's behaviour. Well, what are the present concerns for and efforts to pursue social justice if not evolving rules of conduct? The widespread concern for social justice is a relatively recent phenomenon. It should be no surprise, therefore, that the

rules relating thereto are still nascent. And being nascent, they tend to be vague and at times mutually incompatible. But that this is the case does not denigrate the fact that there is a background of rules (principles) present against which Hayek's process of immanent criticism can work. To turn Hayek's words against him, we may not know what is socially just, but we do have some basis for determining what is socially unjust.

And with that we complete our examination of Hayek's contention that the pursuit of social justice must be rejected because it will inevitably run afoul of his social system. Now, it is important to make clear precisely what it is that I have been arguing in this section. What I have not argued is that the pursuit of social justice will never be incompatible with the maintenance of Hayek's system. That I most certainly do not believe to be the case. I find the specific arguments Hayek makes on this subject quite persuasive. What I do object to, and what I have argued against, is the very broad conclusion Hayek has drawn from his specific arguments. What I object to is Hayek's attempt to reject out of hand any and all concern for social justice without taking the trouble of coming to grips with the specific claim which is being made.

C. Further Thoughts on the Concept of Social Justice

In the first section of this chapter I argued that, contrary to what Hayek maintains, the concept of social justice is not devoid of all meaning. In furtherance of that argument I put forward a very general definition of social justice. And, although very general, that definition was adequate to demonstrate that when people speak of or appeal to social justice they are not speaking nonsense. Quite the contrary, they are having recourse to an intelligible realm of discourse.

In this section I will return to the task of defining the concept of social justice. My intent here is to delineate the boundaries of that concept far more precisely than I have done in the first section of this chapter. I undertake this task solely in the interest of obtaining a more accurate understanding of what is entailed by an appeal to social justice. This objective must be kept in mind, for in my opinion the general definition of social justice which I have already put forward is in and of itself adequate to refute Hayek's claim that social justice is meaningless. I can, therefore, afford to be more controversial at this stage than I could when I was specifically refuting Hayek's argument. I will, of course, put forward an argument which I consider persuasive. But should the reader fail to be persuaded by this section, that fact would not affect the merits of my critique of Hayek's argument.

Now, I have earlier defined social justice as a moral concern with the welfare of one's fellows: denoting by "welfare" physical and psychological well-being. There is, however, another element which, while not specifically an aspect of social justice, is nonetheless frequently seen as a concomitant thereof. That element is the use of the coercive machinery of the state to enforce the moral concern with the welfare of

one's fellows. It is probably safe to say that the vast majority of disputes about social justice involve to some degree the extent to which it is appropriate to use state coercion in support of a call for social justice. In fact, one might say that the most fundamental problem concerning social justice is the extent to which state coercion can be used on behalf of concerns which had previously been deemed outwith the realm of state activity.

But notwithstanding the frequency with which the role of state coercion is involved in discussions of social justice, it is best to keep this element separate and distinct from the basic definition of a moral concern with the welfare of one's fellows. The reason for so doing is that it leaves open the possibility that one might accept social justice as a demand for a moral concern with welfare, and yet refuse to grant to the state any role in the pursuit of social justice. -This possibility is one to which we will recur at the end of this section.

Let us assume then that in order to grasp fully the concept of social justice we must understand two things: what is entailed by a demand for social justice and the proper role of the state in the pursuit of social justice. If we approach the task in this way, it becomes apparent that there are really three questions with which we must be concerned. The first is what sort of moral reasons constitute reasons of social justice. The second is what sort of state activities constitute activities on behalf of social justice. Obviously the answer to this second question will be determined to a large extent by the answer to the first. But it is yet worth asking it as a distinct question. The final question is who, if anyone, has an obligation in regard to social justice. The possibilities here are that there is no obligation of any sort, that the obligation rests strictly on the individual, or that the obligation is

one with which the state may become involved. The remainder of this section will be devoted to an examination of these three questions.

As we have already noted several times, the concept of social justice entails a moral concern with the welfare of one's fellows. In the first section of this chapter we saw that it is necessary to describe this concern as a moral concern in order to preclude other sorts of concerns which patently would not involve a demand for social justice. Thus we saw then that one who argues for the welfare state on prudential grounds (e.g. as necessary to avoid civil disorder) is not arguing for social justice. An argument for social justice must be premised upon moral arguments.

But will any sort of moral argument anent the welfare of one's fellows constitute an argument for social justice? Or will it rather be the case that only particular types of moral argument can be deemed to invoke social justice? At first blush it may seem that the problem here posed is little more than a semantic quibble. And to a certain extent that may be true. If one has made a valid moral argument, of what import is it how one characterizes that argument? There are, however, two reasons which warrant consideration of this problem. The first is that, as we shall see shortly, coercion has traditionally been thought appropriate only to certain sorts of moral arguments. The second is that the more precise we can be in identifying an argument for social justice the stronger will be our rebuttal of Hayek's claim that all appeals to social justice are meaningless. As we have seen in Chapter Six Hayek contends inter alia that an appeal to social justice is no more than a carte blanche justification for government action. Thus, if we can show that only some moral arguments qualify as reasons of social justice, we will at the same time demonstrate that appeals to social justice are far more specific than Hayek is willing to grant.

In attempting to specify the types of moral arguments or reasons which constitute reasons of social justice it is helpful to begin by noting that the concept with which we are concerned is social justice. Linguistically at the very least the concept with which we are concerned would appear to be related to justice. But surely the relationship is more than merely linguistic. With all due respect to Professor Hayek, it seems difficult to ignore the overwhelming opinion amongst both scholars and laymen that when we speak of social justice we are speaking of a sub-set of justice. I would suggest that the similarity between justice and social justice lies in the type of reasoning employed, while the difference lies in the aim towards which that reasoning is employed. Since we have already identified the aim of social justice as the welfare of one's fellows, the question to which we must now turn is what is the distinctive type of reasoning employed in arguments of both justice and social justice.

Of course one might grant that social justice is a sub-set of justice and yet deny that justice itself presents any specific type of moral reasoning. --Thus, one might take the position that to say an action is just is to say no more than that it is the morally right action to perform. In this sense justice really might be seen as synonymous with all of morality. And yet, to argue in this manner does not (if one will excuse the pun) seem to do justice to the concept of justice. Recalling G. E. Moore's open question argument, it seems eminently reasonable to admit that a particular action is just and then to inquire over and above that whether it is the right action to perform. It is because of this dichotomy between justice and morality all things considered that we can use such phrases as "justice tempered with mercy".

To emphasize this dichotomy between reasons of justice and more general moral reasons William Frankena

suggests that we distinguish between "justicizing" and "justifying" reasons.¹⁴ To justicize an action is to give reasons of justice in support thereof. To justify an action is to give more general right-making reasons in support thereof. It is by means of this dichotomy that it is intelligible for us to speak of an action as being just, while at the same time admitting that it is not the morally right action to perform. When we do so, we are saying that, although there are just-making reasons present, there are also additional moral reasons present which are entitled to priority over the just-making reasons. However, that these just-making or justicizing reasons are overridden does not denigrate from the fact that they constitute legitimate and distinct moral reasons for acting.

Granting then that there are quite distinct justicizing reasons involved when one is making a case for social justice, the question remains specifically what are those reasons. What sorts of arguments must be made if one is legitimately to be arguing for social justice? In answering this question let us begin with the fact that justice is what I shall call the coercible virtue. To see this it is essential to separate moral conduct from the state of affairs which results from that conduct. Moral conduct as such cannot be produced by coercion. That is to say, a man cannot be made to behave justly or honestly or charitably. However, he can be made to behave so as to produce a just or an honest or a charitable state of affairs.

But while almost any moral state of affairs can be produced by coercion, it is only in the case of justice that coercion is commonly thought to be appropriate. This is not to say that there is never resort to coercion in the case of other virtues. It is only to say that when coercion is resorted to in such cases the need is seen to defend its use. With other virtues coercion is the exception, not the rule. By contrast,

when justice is involved coercion is commonly accepted without any express defense therefor. In fact, if anything it is in the cases purporting to involve justice but in which coercion seems inappropriate that explanation is required. Of course as we have already noted and as we will consider again later in this section, it is open to dispute whether state coercion can properly be used in support of social justice. However, for our present purpose, which is to isolate justicizing reasons, this point can be ignored.

Now, the reason why coercion is thought appropriate in the case of justice is that justice, in addition to carrying the commendatory sense common to all virtues, also carries a prescriptive sense. It entails what I shall call a strong ought. The just action is one which not only is commendable, but also ought to be done; and that in a strong sense of ought. The notion of a strong ought can best be understood by comparing it with a weak ought. A charitable action is one which is commendable and one which ought to be performed. But this ought, a weak ought, does not have the same force as the ought which is attached to justice. A man who does not perform a charitable action when such is appropriate will not be subject to criticism of the same sort as a man who fails to perform a just action. The former has failed to do something which is desirable, whereas the latter has failed to do something which is required.¹⁵

Another way to look at this distinction between a strong ought and a weak ought is in terms of Lon Fuller's distinction between the morality of duty and the morality of aspiration. The morality of aspiration is "the Morality of the Good life, of excellence, of the fullest realization of human powers."¹⁶ A man who does not comply with it is "condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing."¹⁷ By contrast the morality of duty

lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed towards certain specific goals must fail of its mark. ... It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead it condemns them for failing to respect the basic requirements of social living.

The weak ought is the morality of aspiration, the strong ought the morality of duty. Thus, particular acts of charity are always a matter of aspiration and not duty. (I leave aside the possibility that there may be a duty to perform an indeterminate number of charitable acts during one's life: i.e. a duty to be charitable sometimes.) But justice and just acts are always a matter of duty. Justice is not something to which one should aspire, but something which is positively required.

It is because justice is positively required, because it is a matter of duty, that a demand for justice seems legitimate. By contrast, a demand for, say, charity or mercy strikes us as odd and unwarranted. And it is because a person can demand justice that we are prepared to coerce compliance with the dictates of justice. Conversely, it is because it is more appropriate to speak of asking for charity or mercy rather than demanding them that coercion is not normally thought to be applicable here.

Given then that justice is something which a person can demand, what does this tell us about the sorts of reasons which can be advanced in support of a claim for justice? To begin with, it tells us that we are dealing with a claim. The reasons advanced therefore must be such as will support a claim. And when we are talking about a claim, we are talking about something to which a person is entitled. Thus, reasons of justice must ultimately be reasons of entitlement. And so too

reasons of social justice must be reasons of entitlement, for as we have seen the relationship between justice and social justice lies in the types of reasons by which they are supported. And if there be any question that social justice involves reasons of entitlement, one need only consider that the proponents of social justice leave no doubt that social justice is something to which its beneficiaries are entitled and not something for which they should be grateful: social justice is a claim and not a gift.

A caveat is, however, in order at this point. When I speak of an entitlement I am using the word in a very loose sense. In a more technical sense to speak of an entitlement is to speak of what Miller would classify as a right (as distinct from desert and need) and Hohfeld as a claim-right. Certainly the way in which I am using entitlement would encompass these two uses. Thus, it is clearly the case that what Miller describes as a rights-based theory of justice would meet my requirement that justice be concerned with entitlements.

However, what I understand by entitlement would also come into play in situations in which Miller would see no entitlement or right. For instance, while he distinguishes rights-based theories of justice from those based on desert or need, it seems to me that the idea of an entitlement can be found in each of those theories. In the case of desert it is certainly fair to say that what a person deserves he is also entitled to. (In fact, quite frankly I find Miller's distinction between rights and desert to be untenable; I think the two do stand in a close relationship with one another while being radically opposed to need.) And in the case of need, to the extent that it is being used as a basis for justice then to that extent it represents an entitlement. That is, if the mere fact that John Doe needs X is considered a basis in justice for his having X, then it is appropriate to say that because John Doe

needs X he is therefore entitled to X.

An entitlement can also be seen if one views justice in the light of some duty-based theory of morality. This may initially seem counter-intuitive since with duty the emphasis is on the action, while with entitlement the emphasis is on the beneficiary of the action. However, Hayek himself admits that to the extent that there is a duty to do X, whoever would benefit from the doing of X can be said to have a right to have X done.¹⁹ And in my terminology to have a right to have X done is the same as to be entitled to have X done. In terms of social justice this would mean that if there is a duty to be concerned with the welfare of one's fellows, then one's fellows are entitled to that concern.

Now, having established that an argument for social justice involves reasons of entitlement, the question which remains is entitlement to what. To a large extent our initial definition has already established that. If social justice is a moral concern with the welfare of one's fellows, then the reasons of entitlement must relate to welfare. And welfare, as we have seen, encompasses both physical and psychological wellbeing.

Of course the idea of welfare is quite open-ended. And, while the aim of this section is to narrow the realm of social justice as much as possible, there is little which can be done to bring more precision into the idea of welfare. What is intended thereby, or rather what is argued for under the rubric of social justice, will be dependent upon the specifics of the argument being made. There are, however, two very general points which are worth noting in this connection.

The first is that there appears to be a definite relationship between welfare and needs. When I speak of needs there are two distinct categories with which I am concerned. The first relates to things such as food, shelter and clothing, that is, things

which are essential if human life is to continue. The second category includes things such as minimal education, nutrition above the level needed to maintain bare physical existence, and possibly a supportive network of social relations. Such needs must be met if anything more than mere animal existence is intended. Borrowing the terminology of William Galston I shall refer to these two kinds of needs as existential and developmental.²⁰ I would suggest that anything which qualifies as a need of the sort just described would have to be included under the aegis of welfare. It may very well be that welfare would include things other than needs. But it must at the very least include existential and developmental needs. And thus, such needs must fall within the realm of social justice.

The other general point to be made is that the welfare to which an individual is entitled at any given time and place will be affected by two factors. One is the general conditions of the society in question. Obviously the working idea of welfare will be quite different in a primitive tribal society from what it would be in a Twentieth Century industrial society. The second factor is perhaps parasitic upon the first. That is that there is a comparative element involved in the idea of welfare. What constitutes the entitled welfare of one individual or group will to some extent be determined by the status of the other individuals in that society. Even for a strict egalitarian this comparative element will be present, for he will wish all to have the same level of welfare. Thus, the entitlement of each individual will not be determined in a vacuum, but rather within the matrix formed by the welfare of his fellows.

Let us now summarize the argument to this point. Social justice is a moral concern with the welfare of one's fellows. However, not any moral reason will qualify as an argument on behalf of social justice. Instead only

justicizing or just-making reasons will qualify. Justicizing reasons are reasons which argue for an entitlement, using entitlement in a loose rather than a technical sense. And the entitlement with which reasons of social justice are concerned is an entitlement to a concern with one's welfare.

Given these limitations it should be apparent that there are several commonly utilized moral arguments which cannot be deemed to be arguments on behalf of social justice. The first of these are arguments of charity or benevolence. An argument for welfare made on the grounds of charity or benevolence is clearly not an argument for entitlement, and it is for that reason not an argument for social justice. The second common form of moral reasoning to be excluded is an argument based on reasons of general utility. To argue that the overall balance of happiness over unhappiness, or pleasure over pain, will be increased by a concern with welfare is not to argue entitlement, and for that reason is not an argument for social justice. Finally, there are perfectionist arguments. One might argue that the ideal of either the individual or society in general which one advocates requires the provision of certain services or facilities. But, inasmuch as this is not an argument for entitlement, it is also not an argument for social justice.²¹ Of course, the argument I am making is not to suggest that moral reasons of the sort just considered cannot provide a justification for a concern with the welfare of one's fellows, for that they most certainly can do. What I am suggesting is that any such justifications cannot be considered to be arguments on behalf of social justice. Only when one argues for welfare as a matter of entitlement can one be said to be appealing to social justice.

The second question with which this section is concerned is what sort of state activities constitute activities on behalf of social justice. As was discussed

at the beginning of this section, in practice arguments about social justice are rarely divorced from arguments about state coercion. That is, most disagreements about social justice involve not only whether there is a moral obligation to be concerned with the welfare of one's fellows, but also whether any such obligation should be supported by the state coercive machinery.

In keeping with the instant aim of attempting to be as precise as possible in delineating the realm of social justice, it is worth giving some consideration to the types of state activities which can be viewed under the rubric of social justice. Thus, if we hold to one side state coercion in support of rules of just conduct (which Hayek on more than one occasion suggests to be the only proper use of state coercion), we find there is still a large variety of state activities which are buttressed by the coercive machinery, if only in that they are supported by mandatory taxation. Yet surely not all such activities should be deemed to be in pursuit of social justice. If the contrary were true, then Hayek's contention that the invocation of social justice is no more than a rubber stamp used to justify (justicize) the use of state coercion for any end whatsoever would in fact be warranted. Moreover, aside from Hayek's contention, even the most ardent advocates of social justice would not claim that social justice is involved whenever state coercion is utilized.

The problem then is which exercises of state coercion can be viewed as warranted by a concern with social justice and which not. Of course in one sense we have already resolved this problem in the first part of this section when we considered what sorts of moral reasons constitute arguments in support of social justice. Obviously it follows from that discussion that only state coercion used in behalf of entitlement claims can be viewed as undertaken for reasons of social justice. However, while dispositive, this is an ad hoc response. It requires that each particular state activity

be examined to determine its rationale before any judgment can be made concerning social justice. For that reason it would be quite useful if there were some more general manner in which we could classify state activities (even if only as a rule of thumb) as to whether they involve social justice. And it seems to me that such a classification is possible.

Let us consider first the distinction Ronald Dworkin draws between principle and policy.²² According to Dworkin a principle is something which involves an individual right. By contrast, a policy involves a collective goal. Now, principles in that they involve individual rights will encompass entitlements. And entitlements are the basis of an argument for social justice. Conversely, a policy in that it involves some collective goal will not be concerned with individual entitlements. It follows, therefore, that any state coercion used in support of policies, that is collective goals, will not be undertaken for reasons of social justice.

Given this, we can conclude that there is one type of state activity, buttressed by coercion, which will almost inevitably be excluded from the realm of social justice. This activity is the provision of so-called public goods and services. Under this heading will be included such items as roads and sewers, the establishment of a uniform system of weights and measures, the provision of postal services, and the regulation of inter-state commerce. None of these activities can fairly be seen as involving individual entitlement. Rather, their aim is the provision or assurance of some collective goal. For that reason the provision of such goods and services cannot be treated as a matter of social justice.

There is, however, a caveat which is in order here. It may at first glance seem that the establishment of a national school system and a national health service is done as a matter of public policy and hence

that the justification for such institutions is the pursuit of a collective goal. But more careful consideration will readily demonstrate that the aim of such institutions is the welfare of the individual. Thus, the justification for such institutions will almost inevitably be, at least in part, that they are a matter of individual right or entitlement. (For instance they can quite easily be seen as relating to developmental needs.) For that reason the provision of these institutions should at least prima facie be treated, at least in part, as a matter of social justice.

The other category of state activity which on general grounds there is a basis to exclude from the realm of social justice is what I will call cultural activities and facilities. By this I intend state provision of and funding for such things as symphonies, opera and ballet companies, and museums, as well as subsidies to the arts, and perhaps also subsidies for sports teams and facilities. Funding of this nature is most commonly done in the name of some perfectionist ideal. Sometimes it is argued that the society in general will be better off because of the availability of such facilities. In such circumstances the funding is being done not only for perfectionist reasons but also for purposes of a common goal. Thus, there is clearly no argument for entitlement and hence no case for social justice. Alternatively, it can be argued that the particular members of the society will be better able to realize some ideal of the individual because of the availability of these facilities. Here, while the emphasis of the argument is on the individual, it is nonetheless not an argument of entitlement, but instead an argument based on perfectionist considerations. And for that reason social justice will not be involved.

Some caution, will, however, have to be exercised in this area. While cultural facilities will commonly be justified in terms of perfectionist considerations, this need not always be the case. It is

at least plausible that someone might argue that cultural facilities (at least to some limited degree) constitute a developmental need. That being so, it could then be argued that there is an entitlement to them. And that would be an argument for social justice.

What this last point brings out is that at the end of the day we can never altogether ignore the reasons advanced in support of a particular state activity. The nature of certain state activities may be such that they will almost always fall outwith the realm of social justice. But it is always possible that in some way an argument for social justice may be made in support of one of these activities.

The final question to be considered in this section is who, if anyone, has an obligation of social justice. Or, putting that another way, one might say that our final concern is the possible responses which can be made to an argument for social justice. Let us assume that an argument has been put forward which meets the criteria we have set forth for an argument for social justice. That is, someone is arguing that social justice requires that we do X, X involving the use of the state coercive machinery. What are the ways in which we might respond to that argument? Aside from simply finding the argument invalid, I believe that there are three basic responses which might be made. One might deny that there is an obligation of any sort regarding the welfare of one's fellows. Or one might grant that there is such an obligation, but hold it to be strictly an individual matter with which the state can properly have no concern. Finally, one might grant that there is an obligation and further grant that in general the state may enforce such obligations. One could then either yield to the argument made, or else argue that in the instant case state coercion is not appropriate. Let us now consider each of these possible responses in greater detail.

The first possible response is to deny that there is any obligation of social justice at all. In effect one would here be confronting head on and rejecting the argument for entitlement. For instance, if the argument in question is premised upon need, one could deny that need in and of itself constitutes any ground for entitlement. Again, if the argument is premised upon a right to certain welfare provisions, one could respond by distinguishing positive from negative rights. That is, one could respond that the right in question entails only that others do not interfere with the one seeking to exercise the right, and not that others must positively assist in the pursuit thereof. Similarly, if the argument for social justice were premised upon duty, one could distinguish between positive and negative duties, arguing that the duty is only of forbearance and not of assistance. A response of this nature would be quite in keeping with Hayek's frequent assertion that the rules of just conduct are predominantly negative in form.

In regard to this type of response, one additional point is worth noting... One could deny that there is any entitlement to the provision of welfare, without necessarily condemning individual actions directed to this end. Thus, while denying any entitlement one might yet consider the provision of welfare to be a meritorious course of action. To use Fuller's terminology, one could treat the provision of welfare as a matter of the morality of aspiration rather than the morality of duty. Or more generally speaking, one could argue that the provision of welfare is a matter of supererogation.²³

One might also respond to an argument for social justice by granting that there is an obligation to be concerned with the welfare of one's fellows, but adding that any such obligation falls strictly on the individual and should not be enforced by the state. There are three basic forms such a response might take. First, one might argue for the absolute priority of individual

liberty over competing moral values. Thus, one could hold that however justified (justicized) the case for social justice might be, respect for individual liberty would preclude any state involvement therein. The espousal of this form of response would be compatible with either a Nozickian minimal state (which Hayek explicitly rejects) or an individualist anarchist social theory.

The second form a response of this nature might take would be to emphasize the moral merit involved in voluntary action. This approach would, for example, prize benevolence over beneficence. It would be compatible with the Kantian idea that an action is genuinely moral only if done with the proper motive. The argument would be that, desirable though the provision of welfare might be, it is even more desirable that any such provision be voluntary rather than coerced.

The final form of response is one which I think Hayek would be especially likely to espouse. Here one would not challenge the morality of state enforcement, but would instead challenge its practicality or efficiency. The argument would be that, desirable though the end might be, the means, i.e. state action, are unlikely to achieve that end. Hayek's espousal of critical rationalism and his concomitant mistrust of state action would fit quite nicely with this sort of response.

The remaining way in which one might respond to an argument for social justice is to grant both the obligation of social justice and at least in general the appropriateness of state coercion in support thereof. As to this latter point, one might consider the state's action as warranted by some sort of obligation on society in general. Personally, I am with Hayek in considering the idea of an obligation on society, as distinct from one upon individual members of a society, to be utter nonsense. Nonetheless, an argument of this sort might be made. The other way to justify the role

of the state would be to see the state as merely enforcing an individual obligation. For instance, John Finnis holds that distributive justice is an obligation upon the individual and that the state becomes involved only in the event of recalcitrance by the individual.²⁴ Along this same line one might argue (although Finnis himself does not) that state action is a convenient mechanism to ensure that this individual obligation is fairly and universally fulfilled. Harry Lesser, on the other hand, argues that the individual has an obligation not specifically to help his fellows but rather to see that help is provided. It is this obligation which warrants action by the state.²⁵

Of course, even if one does grant that the state has a role to play in the enforcement of social justice, it will not be necessary to accept all such calls for state action. One can be selective. For example, as was noted in Footnote 21, John Rawls, although he otherwise accepts the role of the state in the pursuit of social justice, rejects any such actions which are based upon perfectionist grounds. It is possible therefore for one to reject particular state actions on behalf of social justice even though in principle one recognizes the appropriateness of state action in this area.

Now, having considered in general terms the ways in which one might respond to an argument of social justice, let us conclude this section by considering that issue in a more specific context. What I propose to do now is to compare the ways in which Hayek and Robert Nozick respond to the challenge of social justice. Both of these men are very determinedly opposed to the use of state coercion in support of the pursuit of social justice. However, the paths by which they reach this end are quite different. And, while a comparison of the two approaches is a relatively brief task, it is nonetheless worth the effort.

Hayek's response to social justice is, of course, the focus of this dissertation. And, although

his argument is long and involved, it can ultimately be epitomized quite succinctly. Hayek's basic response to the challenge of social justice is to deny that there is any challenge to which he must respond. Rather than responding in one of the ways set out above, he instead argues that evocations of social justice fall outwith any intelligible realm of discourse. Since there is nothing which can be understood, there is nothing to which one need respond. Hayek's response reminds one of the way in which Dickens's Mr. Podsnap would wave his hand to figuratively dismiss unpleasant ideas with which he did not wish to come to grips. The trouble is that hand waving is not a terribly persuasive response to ideas which are supported by coherent arguments.

Robert Nozick, on the other hand, never contends that social justice is a meaningless concept. That being the case, he does not dismiss social justice out of hand, but instead spends a large section of his book attacking it head on. His basic approach falls under the second type of response which I detailed above. He argues for the absolute priority of liberty over any state action in support of social justice. And it is important to stress that he does argue for this priority. As we shall see in the next chapter, although Hayek assumes the absolute priority of liberty, he nowhere undertakes to defend this position. One may, of course, find Nozick's argument unpersuasive or incomplete. But he has at least made a coherent argument in response to the challenge of social justice.

Because Nozick's approach is to challenge the appropriateness of state action, it is not clear whether he would admit that there is any individual obligation of social justice. To the best of my knowledge he never discusses this issue. Nonetheless the social order which Nozick advocates does allow room for concerns of social justice. His libertarian utopia is a loose federation of communities in which individuals are free to organize themselves in any manner they wish, subject

only to freedom in emigration and immigration.²⁶ Under this system those who believe strongly that obligations of social justice should be enforced by organized coercion are free to join together in communities in which such an end is pursued. And those who object to such organized coercion are free to refrain from joining communities of this sort. Although Hayek too espouses the value of voluntary associations²⁷, his belief in spontaneous development as the wellspring of social order precludes him from advocating the type of arrangement which Nozick envisions.

As between these two approaches it should be clear that I come down on the side of Nozick. The advantage of Hayek's approach is that, if successful, it precludes ab initio any concern with social justice. The disadvantage is that it is an all or nothing approach. If the problem refuses to be waved away, and I have argued in this dissertation that that is the case, then Hayek has nothing else to say in opposition to demands for social justice. Nozick, on the other hand, although granting the reality of the challenge of social justice, then confronts that challenge head on and attempts to meet argument with argument. If he fails in his task, his very failure is apt to suggest alternative ways of attack. In short, the fact is that social justice does present a real and determinate challenge to social theory. And that being so the frontal approach of Nozick offers the greater likelihood of success.

CHAPTER TEN

SOCIAL JUSTICE, PRIORITY, AND THE KANTIAN PREMISES

The third prong upon which Hayek bases his critique of social justice is the charge that the pursuit of social justice is inimicable to respect for liberty and certain other values associated therewith. This charge actually underlies the contention that social justice is incompatible with Hayek's social system, inasmuch as the ostensible justification for that social system is that it protects and fosters liberty.

In regard to the alleged conflict between social justice and liberty I am of the opinion that Hayek has once again cut too wide a swath with his sword. While some, perhaps many, actions taken in the name of social justice may be incompatible with a respect for liberty, I do not believe that such incompatibility is an inevitable result of pursuing social justice. Thus, the outright rejection of any concern with social justice again seems unjustified. But, having made this point, I will not carry it any further.

In this chapter I intend to take a quite different type of approach from that I took in the preceding chapter. Instead of meeting Hayek's charge head on in an effort to demonstrate that it is not persuasive, I will come at it obliquely. Let me grant him arguendo that the pursuit of social justice is inimicable to a respect for liberty. Having done that, must I now admit that the pursuit of social justice

should be abandoned? The answer to that question is most assuredly no.

To demonstrate that two concepts are incompatible is one thing. To decide which of those competing concepts must prevail when conflict does occur is something altogether different. One cannot simply assume without any argument that one of those concepts must always prevail over the other. And yet, that is what Hayek appears to do when he treats the mere existence of incompatibility between social justice and liberty as a justification for rejecting social justice.

Whether he realizes it or not, what Hayek has is a priority problem between social justice and liberty, or, to be more specific, between a concern for welfare and a concern for liberty. Like it or not, it is incumbent upon him to demonstrate by argument that liberty must prevail. Priority problems can only be resolved by argument, not by fiat. Yet, Hayek offers no express arguments in favor of the priority of liberty over concern for welfare. Certainly in The Constitution of Liberty he discourses at great length upon the value of liberty. However, to demonstrate the value of liberty is not to demonstrate that that value is always entitled to take precedence whenever any other value proves incompatible therewith. This is a quite separate and distinct task, and it is one which Hayek nowhere expressly undertakes.

The key question to be answered then is, is it possible to extrapolate from what Hayek does say a defense for the absolute priority of liberty, which as is he takes for granted. My answer to this question is "no". In fact, not only do I think that Hayek's thoughts fail to provide a defense for the priority of liberty, but I actually think that it is possible to draw therefrom the germ of an argument in defense of social justice.

The essence of that putative defense is as follows. I believe that notwithstanding the patently

seminal role of epistemology in Hayek's social philosophy, there is underlying that philosophy a hidden normative premise. And this premise is the ultimate justification for the prescriptive import of Hayek's social philosophy. But this premise, although it can be seen to justify Hayek's claim for the priority of liberty, can also be seen to justify a concern for social justice.

The purpose of this chapter is to identify that hidden normative premise, to elucidate its relation to Hayek's social philosophy, and to demonstrate how it does not resolve Hayek's priority problem but instead plausibly can be seen to offer support for the pursuit of social justice. I propose to begin on this task by returning once more to Hayek's conception of justice for one final analysis.

A. Intrinsic and Instrumental Goods

There is one question concerning Hayek's conception of justice to which we have of yet given no consideration. That is the question of whether for Hayek justice is an intrinsic or an instrumental good, and if the latter, to what end it is instrumental. In this section I propose to answer the first part of that question. I will do so by initially considering in general the difference between an intrinsic and an instrumental good, and then by considering how and why that difference is significant to a theory of justice.

Something which is intrinsically good is good in and of itself, it is good per se. It is, if you will, categorically and not contingently good. By contrast, something which is instrumentally good is good only insofar as it is a means to something else which is good -- either intrinsically or again instrumentally.

It is contingently and not categorically good, for it is good only because of the 'end' to which it is a means.

At this point a secondary distinction must be introduced. When we speak of something being a means or an instrumental good there are two different ideas which can be involved. Something is extrinsically instrumental if it is a sufficient means to the desired end. Holding a ticket on the Edinburgh-London train is extrinsically instrumental to my getting to London. It is a means to my getting there, but I could get there without that means: e.g. by flying or driving. Something is intrinsically instrumental if it is a necessary means to the desired end. Holding a ticket on the Edinburgh-London train is intrinsically instrumental to my travelling by that train. I cannot ride the train without a ticket. This secondary distinction becomes relevant when we consider the classification of Hayek's conception of justice.

Another way to look at the distinction between intrinsic and instrumental goods is to think of things which are instrumentally good as being demonstrably good. That is, they can be shown to be good. On the other hand, things which are intrinsically good are self-evidently good. But let us here be clear what is meant by "self-evident". What is not meant is the following:

[T]he self-evidence of a principle entails neither (a) that it is formulated reflectively or at all explicitly by those who are guided by it, nor (b) that when it is so formulated by somebody his formulation will inevitably be found to be accurate or acceptably refined and suitably qualified, nor (c) that it is arrived at even only implicitly, without experience of the field to which it relates. 1

Rather, the meaning is:

The expression 'self-evident' means properly that the proposition so called is evident or true, by itself alone; that it is not an inference from some proposition other than itself. . . . By saying that a proposition is self-evident, we mean emphatically that its appearing so to us is not the reason why it is true: for we mean that it has absolutely no reason. [Final emphasis added] 2

That something is intrinsically (self-evidently) good means that no reason can be given why it is good. If a reason could be given why something was good, then that something would be instrumentally and not intrinsically good. If, therefore, justice is an intrinsic good, no reason can be given why it is good.

The distinction between intrinsic and instrumental goods is important when considering a theory of justice, because it affects the resolution of priority problems. If justice is an intrinsic good -- and therefore not susceptible to proof as to its goodness -- then there is no rational way to resolve priority problems between justice and competing concepts, such as social justice (at least according to Hayek). Rational argument requires reasons, and reasons constitute a because. If we say, "justice is good because ..." then the because provides some basis for rational discussion. The basis might prove inadequate to resolve the priority problem, but at least it provides a starting point for discussion.

But as an intrinsic good (if it is so) justice has no because. It is not good because It is simply good in and of itself. That being the case, there are no reasons to be offered in support of justice and hence nothing to be rationally weighed against competing concepts. If justice does compete with another concept, such competition must be

resolved in some non-rational way, for there is no basis on which to argue priority.

Admittedly, even if justice is an instrumental good, any priority problem may (will) reach a point beyond which no further rational argument is possible. Then recourse will have to be to non-rational ways. But justice as an instrumental good at least defers, and in some cases may altogether avoid, the time when such a course is necessary. It provides a definite area within which rational argument can occur. By contrast, justice as an intrinsic good precludes ab initio any rational discussion of priority problems.

Of course, this conclusion by no means constitutes a logically irrebuttable reason for rejecting the idea that justice is intrinsically good. If there are any intrinsic goods -- and surely in any system of morality there must be at least one -- divorce from rational arguments will attach thereto. Perhaps justice is such a good. Fiat justitia, pereat mundus. But be that as it may, for Hayek justice is clearly an instrumental good, as the next section will demonstrate.

B. The Hidden Premise

It is my contention that not only must Hayek's theory of justice be viewed instrumentally, but that his entire social philosophy must be viewed that way as well. If we read between the lines, we see that underlying all Hayek's express statements about justice, underlying his entire social philosophy, there is a hidden premise which serves as a validating principle for Hayek's entire system. That hidden premise is the notion or principle of respect for persons. Respect for persons is the sine qua non for Hayek's system.

I refer to this Kantian premise -- for so I shall designate it -- as a hidden premise because I am aware of only one instance in which Hayek expressly refers to it.

There are undoubtedly many forms of tribal or closed societies which rest on very different systems of rules. All that we are here maintaining is that we know of only one kind of such systems of rules, undoubtedly still very imperfect and capable of much improvement, which makes the kind of open or 'humanistic' society possible where each individual counts as an individual and not only as a member of a particular group, and where therefore universal rules of conduct can exist which are equally applicable to all responsible human beings. It is only if we accept such a universal order as an aim, that is, if we want to continue on the path which since the ancient Stoics and Christianity has been characteristic of Western civilization, that we can defend this moral system as superior to others -- and at the same time endeavor to improve it further by continued immanent criticism. 3

Notwithstanding that there is only this single explicit reference to the Kantian premise, the premise is latent throughout Hayek's social philosophy and especially throughout his theory of justice. It is the premise, itself intrinsically good, which constitutes the end towards which Hayek's theory of justice is instrumental. And it is, therefore, the existence of this premise which constitutes justice as an instrumental good for Hayek.

That respect for persons is a latent premise in Hayek's system becomes patently obvious once we recognize the normative import of that system. It seems indisputable that, despite Hayek's descriptive approach, and despite the seminal role of his epistemology, his is ultimately a normative philosophy.

Thus, while he speaks as if such notions as cosmos, rules of just conduct, and the principle of justice are matters of fact, he is at the same time maintaining that such concepts ought to exist in the world. Even if such notions have never been instantiated in the world -- a statement Hayek would deny -- or even if such notions have been instantiated in the world in the past but now no longer are -- a statement Hayek would ruefully accept -- it remains the case that they ought to be instantiated in the world. And this ought derives from the Kantian premise. Respect for persons constitutes the first link in Hayek's normative chain. It is to his system as the Grundnorm is to Kelsen's Pure Theory of Law. From it hang all the other links.

Consider, for Hayek we ought to respect persons simply because we ought to respect persons. But, given that we ought to respect persons, it then follows (for Hayek) that we ought to value liberty or freedom. This because freedom is a means to respect for persons. We cannot respect persons without at the same time respecting their freedom. Freedom is intrinsically instrumental to respect for persons. (It must be stressed that this argument and the subsequent ones are arguments which I think can and must be inferred from Hayek's philosophy if we are to make sense of it. They are, however, never expressly made by Hayek himself.)

Given that we ought to respect freedom we ought also to maintain a cosmos, a spontaneously ordered society. And, given that we ought to maintain a cosmos, we ought also to 'structure' society by means of general, purpose-independent rules, i.e. rules of just conduct. Only by maintaining a cosmos, itself maintained by rules of just conduct, can we insure an optimum opportunity for the exercise of individual freedom. Thus, for Hayek the cosmos with its rules of just conduct is intrinsically instrumental

to respect for persons. By contrast, to maintain society as a taxis, a deliberately constructed order, structured about specific directives, i.e. rules of organization, is to evince a patent disregard for individual freedom and hence a disregard for respect for persons.

With Hayek's theory of justice the instrumental link to respect for persons shows through at several points. To begin, the rules which the theory of justice presupposes are the rules of just conduct. And these, as we have just seen, are intrinsically instrumental to freedom which is in turn intrinsically instrumental to the Kantian premise.

Then, there is Hayek's basic principle of justice: "the principle of treating all under the same rules." ⁴ Hayek never attempts to explain why it is that we should be concerned with treating all under the same rules. But the Kantian premise can fill this gap. If one's aim is respect for persons, treating all under the same rules can be seen as a necessary means thereto. This for two reasons. First, to repeat again, the rules of justice are a necessary concomittant of freedom, and freedom is a necessary concomittant of respect for persons. Second, respect for persons entails equal respect for persons; respect if it is not equal is not respect at all. Hence, unless we utilize rules, and unless we apply them equally to all, we are not respecting persons. Hayek's principle of justice is, therefore, intrinsically instrumental to the Kantian premise, that premise thereby providing both the derivation of and the justification for the principle.

The Kantian premise also plays a dominant, albeit latent, role in Hayek's rejection of the "mirage of social justice". At the heart of that rejection is Hayek's perceived conflict between justice and social justice. Justice depends upon rules of just conduct. Social justice, on the other hand, depends

upon rules of organization, or so Hayek argues. Justice leads through rules of just conduct to freedom and ultimately to respect for persons. Social justice, because it flies in the teeth of rules of just conduct, cannot (according to Hayek) lead on to freedom and thence on to respect for persons. Social justice must, therefore, be rejected. We will, however, see shortly that it is debatable, to say the least, whether social justice is, in fact, incompatible with respect for persons. But that the argument may be defective, does not alter the fact that it is the argument Hayek makes.

The final way in which the Kantian premise fits into Hayek's theory of justice is as important, if not more so, than the way the premise is used to reject social justice. There is a seeming anomaly in Hayek's theory. For Hayek justice is a system relative concept. This is because the substance of justice is determined by the rules of just conduct which it presupposes, and the rules of just conduct are a contingent fact about particular societies. Thus, the rules of just conduct in one society may, and probably will, differ from those in another society. It appears, however, that justice is satisfied so long as 1) a society has rules of just conduct, 2) those rules are mutually consistent and form a coherent whole, and 3) they are applied to everyone.

And yet, Hayek is prepared to evaluate an entire system, to describe it as better or worse than other systems. But, if justice is purely system relative, there is no way he can do this. The Kantian premise provides a way around this dilemma. It provides an external standard for evaluating systems of justice. A system of justice is better or worse than others depending on how conducive it is to respect for persons. To see that this is what Hayek is doing, we need only look again at a part of the passage quoted at the beginning of this section.

It is only if we accept such a universal order as an aim, that is, if we want to continue on the path which since the ancient Stoics and Christianity has been characteristic of Western civilization, that we can defend this moral system as superior to others ... 5

To sum up, the Kantian premise, the notion of respect for persons is an indispensable element of Hayek's entire social philosophy and particularly his theory of justice. Although the premise surfaces only once, its presence is continuously felt. One cannot understand Hayek on society or justice without understanding the seminal role of respect for persons.

C. The Priority Problem

Having identified the presence and the importance of the Kantian premise in Hayek's social philosophy, the point to be considered now is how, if at all, that premise relates to what I have designated as Hayek's priority problem. More specifically, the immediate question to be answered is, does the Kantian premise support Hayek's claim that a concern for liberty must always take precedence over a concern for social justice (or welfare). If it does, then Hayek's contention that the pursuit of social justice must be abandoned because it is inevitably incompatible with a respect for individual liberty will stand proven.

As far as Hayek is concerned, the fact that respect for individual liberty is intrinsically instrumental to the Kantian premise would conclusively resolve any priority problem. Since one cannot respect persons without respecting their liberty, any value which is incompatible with respect for liberty is ipso facto incompatible with respect for persons. And given that the latter is the basal value for Hayek's

entire social philosophy, there can be no question that it must take priority over any and all competing values.

Of course, while this argument would solve the priority problem for Hayek, it would prove unconvincing to anyone who did not accept the Kantian premise as the ultimate value of their social or moral system. Vis-a-vis such people, Hayek would still be left with a priority problem, only it would now be shifted to a different level: the question now being why respect for persons should be entitled to priority over whatever other base value was being espoused.

How such a priority problem could be resolved is, however, a question which we need not consider any further. That is because even within his own value system I think that Hayek's argument for the priority of liberty is open to question. Hayek's argument for the priority of liberty over social justice would be a persuasive argument (again, within the confines of his value system) provided that respect for liberty were co-extensive with respect for persons. But that is something which Hayek nowhere argues.

To be sure, the entire argument based on the Kantian premise is a reconstruction; it is never expressly made by Hayek. But it is clear from that reconstruction that Hayek never gives a first thought, much less a second one, to the possibility that in addition to respect for liberty there might be other elements involved in the Kantian premise. No, it is patently obvious that as far as he is concerned, when one speaks of respect for persons one is speaking of rational autonomy. To Hayek the important things are for a person to be able to make his own decisions, to order his own life, and to select his own values. This is what liberty is all about. And to ensure this liberty to an individual is to respect him as a person. Nothing which Hayek says, nothing which he argues, contradicts this conclusion. Quite the contrary. The

thrust of his polemic against social justice is that liberty is the essence of respect for persons.

With all due respect to Professor Hayek, I think that his position regarding the essence of the Kantian premise is, at the very least, open to debate. Now, books have been written about what is entailed by the notion of respect for persons,⁶ and the topic is far from non-controversial. That being so, it is most certainly not my intent here -- in one section of one chapter of a dissertation -- to put forward and comprehensively defend my own interpretation of respect for persons. Fortunately (for me) that is not a task which I have to undertake. For my present purposes it will be sufficient if I merely demonstrate that the Kantian premise is reasonably susceptible to an interpretation whereby the concerns of social justice are of at least equal weight with those of rational autonomy.

Such an interpretation could take the following form. Respect for persons entails two basic elements: rational autonomy and a concern for welfare. Inasmuch as the distinguishing essence of man is his reason, rational autonomy must be considered the higher of the two elements, for without liberty reason is but a shadow of itself. However, one cannot neglect the element of welfare. Man is a rational animal; his rationality is embedded in his animal nature. As an animal man has certain basic needs which must be met: food, clothing, shelter, adequate medical care. Not only are such things needed to sustain man's animal nature, but unless such needs are met a man cannot fully exercise his rational nature. Of what value is rational autonomy to a man who is ill-fed and ill-clothed. Moreover, there are additional needs which pertain not to mere physical existence, but rather to man's efforts to develop his existence,⁷ to make something out of his life. In this category are such things as education and the opportunity for meaningful employment. These needs too must be met if rational autonomy is to be anything more.

than a mere sham. In short, if our goal is to respect persons, it is not enough merely to ensure rational autonomy. We are also obligated to see that certain basic needs are met, for unless these needs are met, it is mere empty cant to say that we have respected persons.

Now, I certainly do not maintain that I have in any sense defended this interpretation of the Kantian premise. I have at best given a very brief sketch of what such a defense would look like. However, I do maintain that this interpretation is prima facie plausible. It is at least as plausible as Hayek's unargued position that respect for persons and rational autonomy are essentially co-extensive. Given the plausibility of this interpretation, and given Hayek's failure to argue for his own interpretation, I think it fair to say that we are back to where we began, we have again come face to face with the priority problem.

The significance of this priority problem cannot be overemphasized. In my opinion it is the crux of Hayek's entire critique of social justice. What Hayek is really concerned with is upholding the primacy of liberty over a concern for welfare. All of his talk about the meaninglessness of social justice and its incompatibility with his social system is no more than a smoke screen which he uses to avoid meeting the real issue head on. Whether Hayek's critique of social justice stands or falls depends on whether the primacy of liberty over welfare can be justified. Hayek's failure to undertake such a justification constitutes a crucial and vitiating hole in his critique of social justice.

CHAPTER ELEVEN

AN APPRAISAL

The purpose of this final chapter is to give an overall appraisal of Hayek's critique of social justice. The evaluation is concerned with the merits of the critique in and of itself and with the significance of the critique in relation to the general problem of social justice. Such being the case, there are three distinct facets of Hayek's thought which will be considered herein. The first is the problems which exist in relation to specific aspects of the critique of social justice. The second is problems involving the substance of the critique in general. The third, and to my mind most important, is a fundamental problem involving the general nature of Hayek's critique of social justice.

The first two of these aspects can be disposed of rather quickly as we have already given extensive consideration to them during the course of this dissertation. As far as the specifics of the critique of social justice, if one were to attempt to epitomize the most basic problem presented thereby, one would have to say that Hayek's social theory is replete with holes and fuzzy edges. Although he attempts to set forth a comprehensive social system, in fact he speaks only in the most general terms. Hence, while such concepts as the spontaneous order, rules of just conduct, and justice are essential to his philosophy what he says about these concepts is far from complete or coherent.

Thus, we have seen, for instance, that the idea of the spontaneous order, which is absolutely indispensable to his critique of social justice, is of questionable viability even viewed on its own terms. Particularly disturbing is Hayek's failure to provide a clear-cut distinction between legitimate adjustments of and illegitimate tampering with this order. As to the rules of just conduct, we have seen that there is real doubt as to the claim that they arise and are developed in a non-volitional manner. Hayek simply glosses over some points which are essential if this claim is to be maintained. Likewise, the defining characteristics of these rules -- generality and purpose-independence -- are so vague as to leave in doubt what is really required. Finally, there is Hayek's conception of justice. Notwithstanding the extensive reconstruction I have attempted thereof, I would have to say that what Hayek expressly tells us about justice is a muddled patch-work of ideas whose inter-relationship one can at times only guess at. Yet despite the wobbly condition of his conception of the social order, Hayek would have us accept that the pursuit of social justice should be abandoned because it is incompatible with this order.

As to the problems with the substance of Hayek's critique of social justice in general, these too can be succinctly epitomized. Hayek seeks to draw conclusions which are far broader than those which are actually warranted. Either Hayek does not grasp the way in which the concept of social justice functions in disputes about social theory, or if he does grasp the function he chooses to ignore it.

The essence of Hayek's difficulty is that in dealing with social justice he attempts to treat as a monolithic concept what is in fact a sort of blanket word. As Hayek himself recognizes, the term social justice covers a wide variety of appeals which are bound together only by a very general common denominator:

i.e. a moral concern for the welfare of one's fellows. Even granting that only reasons of entitlement will qualify as arguments on behalf of social justice, there is still an almost unlimited range of arguments which can be made in the name of social justice. Hence, the mere fact that an appeal is made to social justice tells us very little, aside from the basic nature of the appeal being made. Only by examining the precise nature of that appeal can we learn exactly what it is that is being argued.

But in his critique Hayek attempts to reject in toto any and all appeals which might be made under the aegis of social justice. He does this by attacking particular conceptions of social justice. That some conceptions of social justice are incompatible with the spontaneous order, with rules of just conduct, and with justice, clearly does not demonstrate that all such conceptions have the same failing. Yet throughout his trilogy the target of Hayek's attack is social justice, the mirage of social justice, the pursuit of social justice. One can only wonder what Hayek really intended as his target. If it was social justice in all of its manifestations, then it is certain that he has missed his mark. If, on the other hand, Hayek's real concern is only those conceptions of social justice which will require the abandonment of the spontaneous order, then it is both misleading and irresponsible of him to make the claim which he does: to wit, that the pursuit of social justice should be abandoned in its entirety.

Harsh though these first two conclusions about Hayek may appear, they are mild as compared with the third and final one. My primary objection to Hayek's critique of social justice is that he does not understand what is really involved when people argue about social justice. Consequently, his critique is radically misconceived and regrettably of only limited value.

The essence of the problem of social justice is the question of the extent to which it is justified to use the state coercive machinery to compel a concern for the welfare of one's fellows. And this is undeniably a normative question. It concerns the way we ought to behave: what ought our obligations to be to our fellows. It is, in short, a matter of substantive morality. And it can properly be dealt with only as such. That means the arguments both for and against must be normative arguments, for that is the only sort of argument which is appropriate in the context of this question.

It is not surprising, therefore, that the massive corpus of literature on social justice is concerned almost exclusively with normative arguments. The question is always what ought we to do, and the arguments consist of reasons supporting or opposing the particular course of conduct under consideration. The problem of social justice is a matter of values and not facts, it is a matter of practical and not theoretical reason. One can examine almost anything written on social justice and he will find this to be the case. Almost anything.

But one will search Hayek's corpus in vain if one seeks normative arguments. As we have seen, for instance, he does not even attempt to argue the priority of individual liberty. What one will find in Hayek is an argument which is at heart epistemological. Notwithstanding the latent Kantian premise which underpins his philosophy, Hayek does not treat social justice as a normative problem. Nowhere does he come to grips with the sorts of arguments which are made in support of claims for justice by need, or justice by desert, or an egalitarian version of justice. Hayek is simply not concerned with such arguments. Instead, beginning with his theory of critical rationalism he proceeds to develop a social theory which flows from that premise. And on the basis of that theory he rejects as meaningless all appeals to social justice.

The point is, however, that while epistemological arguments are relevant to the sorts of normative arguments we can make, they cannot altogether replace those arguments. At the end of the day we will still always be left to decide how it is that we should act. And that means that we will still be left with the normative arguments. Whether, and to what extent, we ought to concern ourselves with the welfare of our fellows is a question which must be answered by precisely the sorts of normative arguments that social theorists have been making for years. To reject out of hand the demands of social justice is not an effective way to proceed. One must instead confront the particulars of those demands and posit counter-arguments thereto.

The value of Hayek's approach is that it provides, so to speak, the necessary grain of salt which must be taken with any such arguments. But in and of itself it is insufficient to convince one way or the other. Sad to say, despite his extended polemic against social justice, Hayek never really deals with the substance of the problem.

APPENDIX I

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APPENDIX II

FOOTNOTES

The bulk of the citations in this dissertation are to the works of F. A. Hayek. For the sake of simplicity Hayek's major works will be abbreviated herein as follows:

- RS: The Road to Serfdom (Routledge & Kegan Paul, 1944, repr. 1976)
- CL: The Constitution of Liberty (Routledge & Kegan Paul, 1960, repr. 1963 and 1976)
- S: Studies in Philosophy, Politics and Economics (Routledge & Kegan Paul, 1967)
- NS: New Studies in Philosophy, Politics, Economics and the History of Ideas (Routledge & Kegan Paul, 1978)
- RO: Rules and Order (Routledge & Kegan Paul, 1973)
- MSJ: The Mirage of Social Justice (Routledge & Kegan Paul, 1976)
- POFP: The Political Order of a Free People (Routledge & Kegan Paul, 1979)

FOOTNOTES

Chapter One

1. Rules and Order (Routledge & Kegan Paul, 1973); The Mirage of Social Justice (Routledge & Kegan Paul, 1976); The Political Order of a Free People (Routledge & KeganPaul, 1979).
2. The Road to Serfdom (Routledge & Kegan Paul, 1944, repr. 1976).
3. John Rawls, A Theory of Justice (Harvard, 1971).

Chapter Two

1. RO, p. 37.
2. For a comprehensive examination of the seminal role of Hayek's epistemology in his philosophical system see John Gray, Hayek On Liberty (Blackwell, 1984). This work became available to me only after this dissertation was in the final stages of polishing. Accordingly, I have been able to make only limited reference thereto. However, I believe that at least as far as the spontaneous order Dr. Gray and I are essentially in agreement in our interpretation of Hayek.
3. RO, p. 9.
4. RO, p. 17.
5. RO, p. 21.
6. RO, p. 17.
7. RO, p. 20.
8. RO, p. 20.
9. RO, p. 10.
10. F. A. Hayek, "Kinds of Rationalism" in S, p. 82, at p. 85.
11. RO, p. 8-9.
12. Quoted in RO, p. 25.
13. RO, p. 11.
14. RO, p. 33.
15. RO, p. 29.
16. RO, p. 22.
17. RO, p. 12.

18. RO, p. 13.
19. RO, pp. 14-15.
20. RO, p. 15.
21. RO, p. 16.
22. RO, p. 17.
23. RO, p. 15.
24. RO, p. 20.
25. RO, p. 30.
26. RO, p. 30.
27. F. A. Hayek, "Kinds of Rationalism" in S, p. 82 at p. 93.
28. Quoted in RO, p. 20.
29. RO p. 18.
30. RO, p. 37.
31. RO, p. 44.
32. RO, p. 45.
33. RO, p. 37.
34. RO, p. 49.
35. RO, p. 38.
36. RO, p. 38.
37. RO, p. 41.
38. RO, p. 42.
39. RO, p. 14.
40. RO, p. 14.
41. MSJ, p. 36.
42. MSJ, p. 27.
43. MSJ, p. 109.
44. MSJ, p. 108.
45. MSJ, p. 109.
46. MSJ, p. 110.
47. MSJ, p. 115.
48. MSJ, p. 117.
49. MSJ, p. 117.
50. But see John Gray op. cit. at p. 83, where it is suggested that for Hayek the central problem of economics is the generation and utilization of dispersed knowledge, rather than the efficient utilization of scarce resources.
51. MSJ, p. 113.
52. MSJ, pp. 116-17.
53. MSJ, p. 114.
54. MSJ, p. 117.
55. F. A. Hayek, The Constitution of Liberty (Routledge & Kegan Paul, 1960 repr. 1963 and 1976)

Chapter Three

1. MSJ, p. 31.
2. RO, p. 75.
3. RO, p. 17.
4. RO, p. 19.
5. RO, p. 17.

6. RO, p. 50.
7. RO, p. 49.
8. RO, pp. 112-13.
9. RO, p. 113.
10. MSJ, p. 4.
11. RO, p. 17.
12. RO, pp. 43-4.
13. RO, p. 44.
14. RO, p. 44.
15. RO, p. 55.
16. RO, p. 101.
17. MSJ, p. 36.
18. MSJ, pp. 36-7.
19. MSJ, p. 37.
20. MSJ, p. 123.
21. MSJ, p. 38.
22. MSJ, p. 101.
23. RO, pp. 85-6.
24. RO, p. 17.
25. RO, pp. 74-6.
26. RO, p. 13.
27. RO, p. 19.
28. F. A. Hayek, "The Primacy of the Abstract",
in NS, p. 35. For a more detailed look at Hayek's
thought in this area see John Gray op. cit.,
Chapter 1.
29. RO, p. 30.
30. RO, pp. 76-7.
31. RO, p. 100.
32. RO, p. 99.
33. RO, p. 87.
34. RO, p. 87.
35. RO, p. 77.
36. RO, p. 78.
37. MSJ, p. 32.
38. RO, p. 78.
39. See for example RO, p. 127.
40. RO, p. 126.
41. MSJ, p. 24.
42. RO, p. 87.
43. RO, p. 77.
44. RO, p. 95.
45. RO, p. 13.
46. MSJ, p. 39.
47. MSJ, p. 39.
48. MSJ, p. 90.
49. MSJ, p. 39.
50. MSJ, p. 35.
51. MSJ, p. 35.
52. MSJ, p. 159 n.5.
53. RO, pp. 112-13.
54. RO, p. 11.
55. RO, p. 50.
56. RO, p. 50.
57. MSJ, p. 28.
58. CL, pp. 306-23
59. MSJ, p. 40.
60. RO, p. 107.

Chapter Four

1. RO, pp. 85-6.
2. John Finnis, Natural Law and Natural Rights ;
(Oxford, 1980), Chapter XII, pp. 351 ff. .
3. MSJ, pp. 44-56.
4. MSJ, p. 53.
5. MSJ, pp. 54-5.
6. MSJ, p. 55.
7. MSJ, p. 55.
8. MSJ, p. 54.
9. F. A. Hayek, "The Principles of a Liberal Social
Order", in S, p. 160, at p. 165.
10. RO, p. 90.
11. RO, p. 126.
12. RO, p. 127.
13. RO, p. 85.
14. RO, p. 126.
15. RO, p. 127.
16. RO, pp. 124-25.
17. RO, p. 126.
18. RO, p. 143.
19. RO, p. 137.
20. RO, p. 88.
21. RO, p. 89.
22. RO, p. 89.
23. RO, p. 88.
24. RO, p. 88.
25. RO, p. 87.
26. RO, p. 88.
27. RO, p. 89.
28. MSJ, p. 41.
29. RO, p. 78.
30. POFP, pp. 120-21.
31. RO, pp. 126-27.
32. MSJ, p. 34.
33. RO, p. 78.
34. MSJ, p. 34; see also RO p. 96.
35. Compare H. L. A. Hart's argument that one of the
factors distinguishing a social rule from a mere
habit is that deviation therefrom is considered
justified grounds for criticism. H. L. A. Hart,
The Concept of Law (Oxford, 1961) pp. 54-5.
36. MSJ, p. 38.
37. H. L. A. Hart, op. cit., Chapter V.
38. MSJ, p. 158, n.3.
39. RO, p. 72.
40. MSJ, p. 58.
41. CL, p. 62.
42. CL, pp. 62-3.
43. See H. L. A. Hart, op. cit., Chapter III.
44. op. cit., pp. 38-41.
45. RO, p. 127.
46. RO, p. 78.

47. POFP, p. 28.
48. MSJ, p. 37.
49. MSJ, p. 36.
50. RO, p. 101.
51. But see John Gray op. cit., p. 98, where it is held that Hayek sees equality of liberty rather than the harm principle as the qualifier of individual liberty.
52. RO, p. 137.
53. MSJ, p. 57.
54. Robert Nozick, Anarchy, State, and Utopia, (Blackwell, 1974)
55. MSJ, p. 1.
56. MSJ, p. 2.
57. POFP, p. 131.
58. POFP, p. 41.
59. CL, p. 144.
60. MSJ, p. 114.
61. POFP, pp. 44-5
62. CL, p. 144.
63. RO, p. 137.

Chapter Five

1. POFP, p. 36.
2. MSJ, p. 33.
3. MSJ, p. 39.
4. RO, p. 75.
5. MSJ, p. 33.
6. POFP, p. 36.
7. MSJ, p. 41.
8. MSJ, p. 43.
9. RO, p. 78.
10. MSJ, p. 32.
11. MSJ, p. 33.
12. Immanuel Kant, Groundwork of the Metaphysic of Morals, in H. J. Paton, ed., The Moral Law (Hutchinson, 1948, repr. 1976), p. 84.
13. MSJ, p. 43.
14. MSJ, p. 43.
15. John Finnis, op. cit., p. 61.
16. MSJ, p. 14.
17. RO, p. 110.
18. MSJ, p. 60.
19. MSJ, p. 48.
20. MSJ, p. 44.
21. MSJ, p. 44.
22. MSJ, p. 42.
23. MSJ, p. 54.
24. Lon Fuller, The Morality of Law (Yale, rev. ed. 1969)
25. John Rawls, op. cit.; William Galston, Justice and the Human Good (Chicago, 1980); Bruce Ackerman Social Justice in the Liberal State (Yale, 1980)

26. MSJ, p. 24.
27. D. D. Raphael, "Conservative and Prosthetic Justice" in Justice and Liberty (Athlone, 1980), p. 74, at p. 89.
28. RO, p. 89.
29. RO, p. 95.
30. MSJ, pp. 15-6.
31. F. A. Hayek "The Principles of a Liberal Social Order", in S, p. 160, at p. 166.
32. Ibid.
33. MSJ, p. 31.
34. David Miller, Social Justice (Oxford, 1976), p. 17.
35. John Rawls, op. cit., p. 3.
36. Lars Ericsson, Justice in the Distribution of Economic Resources (Almqvist & Wiksell, 1976), p. 12.
37. MSJ, p. 39.
38. MSJ, p. 31.
39. MSJ, pp. 31-2.
40. David Miller, op. cit., p. 18.
41. POPF, p. 136.
42. Bruce Ackerman, op. cit., Chapter 4.
43. MSJ, p. 33.
44. CL, p. 99.
45. MSJ, p. 70.
46. Genesis, Chapter 27.
47. MSJ, p. 70.
48. MSJ, p. 33; see also MSJ, p. 64 and p. 70.
49. F. A. Hayek, "Individualism: True and False" in Individualism and Economic Order (Routledge & Kegan Paul, 1949), p. 14.
50. CL, p. 157.
51. F. A. Hayek, "The Principles of a Liberal Social Order" in S, p. 160, at p. 166.
52. MSJ, p. 31.
53. MSJ, p. 31.
54. John Rawls, op. cit., p. 102.
55. MSJ, p. 32.
56. RO, p. 141.
57. MSJ, pp. 73-4.
58. MSJ, p. 38.
59. MSJ, p. 16.
60. F. A. Hayek, "What is 'Social'?--What Does It Mean", in S, p. 237, at p. 244.
61. MSJ, pp. 71-2.
62. MSJ, p. 62.
63. CL, pp. 94-5.
64. F. A. Hayek, "What is 'Social'?--What Does it Mean" loc. cit.
65. MSJ, p. 39; see also MSJ, p. 8.
66. MSJ, p. 39.
67. Chaim Perelman, Justice, Law, and Argument (Reidel, 1980), p. 5.
68. Chaim Perelman, op. cit., p. 2.
69. MSJ, pp. 56-9.
70. Ronald Dworkin, Taking Rights Seriously (Duckworth, 1977), pp. 105-30.
71. MSJ, p. 41.
72. Compare John Rawls, op. cit., p. 20.
73. MSJ, p. 42.

Chapter Six

1. MSJ, p. 66.
2. MSJ, p. 65.
3. MSJ, p. 66.
4. MSJ, p. 67.
5. MSJ, p. 66.
6. MSJ, p. 68.
7. MSJ, p. 68.
8. MSJ, p. 69.
9. MSJ, p. 78.
10. MSJ, p. 79.
11. MSJ, p. 79.
12. MSJ, p. 79.
13. MSJ, p. 2.
14. MSJ, p. 2.
15. MSJ, p. 2.
16. MSJ, pp. 2-3.
17. MSJ, p. 3.
18. MSJ, p. 3.
19. POPF, p. 17.
20. MSJ, pp. 7-8.
21. MSJ, p. 6..
22. MSJ, p. 6.
23. MSJ, p. 3.
24. MSJ, p. 5.
25. MSJ, p. 80.
26. MSJ, p. 39.
27. MSJ, p. 82.
28. MSJ, p. 83.
29. MSJ, p. 83.
30. MSJ, p. 84.
31. MSJ, p. 84.
32. MSJ, pp. 84-5.
33. MSJ, p. 85.
34. MSJ, p. 63.
35. MSJ, p. 65.
36. For a detailed discussion of the issues raised by a needs based principle of justice see, for example, David Miller, op. cit., pp. 122-50.
37. MSJ, p. 62.
38. MSJ, p. 75.
39. MSJ, p. 76.
40. MSJ, pp. 75-6.
41. MSJ, p. 77.
42. MSJ, p. 92.
43. MSJ, p. 93.
44. MSJ, p. 94.
45. MSJ, p. 95.
46. MSJ, p. 87.
47. MSJ, p. 78.
48. MSJ, p. 88.
49. MSJ, p. 90.
50. MSJ, p. 98.
51. MSJ, p. 95.
52. MSJ, p. 72.

53. MSJ, p. 80.
54. MSJ, p. 85.
55. MSJ, p. 64.
56. MSJ, p. 67.
57. MSJ, p. 85.
58. MSJ, p. 69.
59. MSJ, p. 99.

Chapter Seven

1. Chaim Perelman, The Idea of Justice and the Problem of Argument (Routledge & Kegan Paul, 1963), p. 86.
2. Chaim Perelman, Justice, Law and Argument (Reidel, 1980), p. 28.
3. RO, pp. 56-7.
4. RO, p. 13.
5. William Galston, op. cit., Chapter 2, at pp. 13-4.
6. RO, pp. 15-7.
7. RO, p. 15.
8. Wieslaw Lang, "Marxism, Liberalism and Justice" in Eugene Kamenke and Alice Erh-Soon Tay, eds., Justice (Arnold, 1979), p. 116, at pp. 136-7.
9. CL, Chapters 17-24.
10. See John Gray op. cit., pp. 118-25 for a somewhat similar thought.
11. RO, p. 18.
12. RO, p. 99.
13. CL, p. 40.
14. CL, p. 41.
15. MSJ, p. 109.

Chapter Eight

1. RO, p. 87.
2. MSJ, p. 14.
3. In relation to the problems involved in a breakdown of consensus, it is worth looking at what Simpson has to say about the role of consensus in the English Common Law. See, A. W. B. Simpson "The Common Law and Legal Theory" in Simpson, ed., Oxford Essays in Jurisprudence (Second Series) (Oxford, 1973), p. 77, especially pp. 95-9.
4. RO, pp. 119-20.
5. RO, p. 78.
6. D. Neil MacCormick, Legal Reasoning and Legal Theory (Oxford, 1978)
7. Ronald Dworkin, op. cit.

Chapter Nine

1. Chaim Perelman, Justice, Law, and Argument (Reidel, 1980), p.2.
2. John Rawls, op. cit., p. 5.
3. MSJ, p. 41.
4. MSJ, p. 65.
5. MSJ, p. 98.
6. John Rawls, op. cit.
7. MSJ, p. 66.
8. RS, p. 59.
9. RO, p. 141.
10. CL, p. 285
11. MSJ, p. 20.
12. Robert Nozick, op. cit., p. 155 ff. .
13. RO, p. 50.
14. William K. Frankena, "The Concept of Social Justice", in R.B.Brandt, ed., Social Justice (Prentice-Hall, 1962), p. 1, at p. 5.
15. For a similar use of strong and weak oughts see James S. Fishkin, The Limits of Obligation (Yale, 1982), pp. 11-13.
16. Lon Fuller, op. cit., p. 5.
17. Ibid..
18. Lon Fuller, op. cit., pp. 5-6.
19. MSJ, pp. 101-2.
20. William Galston, op. cit., p. 162 ff.; see also Raymond Plant et al., Political Philosophy and Social Welfare (Routledge & Kegan Paul, 1980), Ch. 3.
21. John Rawls also excludes perfectionist considerations from the realm of social justice (op. cit., pp. 325-32). However, he does so, not because he sees entitlement as an integral aspect of social justice, but rather because he concludes that perfectionism would not be chosen as a principle of justice in the original position.
22. Ronald Dworkin, op. cit., p. 90 ff.
23. See James S. Fishkin, op. cit., pp. 14-19; and David Heyd, Supererogation (Cambridge, 1982), especially Ch. 8.
24. John Finnis, op. cit., pp. 184-88.
25. Raymond Plant, op. cit., p. 45; see p. xiii for the attribution of this chapter to Harry Lesser.
26. Robert Nozick, op. cit., p. 320 ff.
27. MSJ, pp. 150-52.

Chapter Ten

1. John Finnis, op. cit., p. 68.
2. G. E. Moore, Principia Ethica (Cambridge, 1903, repr. 1978), p. 143.
3. MSJ, p. 27.
4. MSJ, p. 39.
5. MSJ, p. 27.
6. See for example R. S. Downie and Elizabeth Telfer, Respect for Persons (Allen & Unwin, 1969)
7. I have borrowed the idea of developmental needs from William Galston, op. cit., pp. 164-5.